

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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**CASES**  
**ARGUED AND DETERMINED IN THE**  
**COURT OF APPEALS**  
**OF**  
**NORTH CAROLINA**  
**AT**  
**RALEIGH**

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**FALL SESSION 1971**

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**STATE OF NORTH CAROLINA v. JULIUS STEWART SUMMRELL**

**No. 713SC744**

**(Filed 15 December 1971)**

- 1. Indictment and Warrant § 8— resisting arrest — assault on an officer — election by solicitor**

The trial court did not err in the denial of defendant's motions made before the introduction of any evidence to require the solicitor to elect whether he would prosecute defendant on the charge resisting arrest or on the charge of assault on an officer.

- 2. Arrest and Bail § 6; Assault and Battery § 11— resisting arrest — assault on an officer — motion to quash — motion in arrest of judgment**

The trial court did not err in the denial of defendant's motions to quash the warrants and to arrest the judgments in this prosecution for resisting arrest and assault on an officer.

- 3. Disorderly Conduct and Public Drunkenness § 1— disorderly conduct statute — constitutionality**

The statute defining the crime of disorderly conduct, G.S. 14-288.4, is not unconstitutionally vague and overbroad.

- 4. Criminal Law §§ 42, 77— motion to see exculpatory statements**

The trial court did not err in the denial of defendant's motion "to see any and all exculpatory statements which the state had," where there is nothing in the record to indicate that the State had any "exculpatory statements" in its possession or that defendant made any request for such statements or exhibits in accordance with G.S. 15-155.4.

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State v. Summrell

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**5. Criminal Law § 71— testimony that defendant was talking “loud and boisterous”**

In this prosecution for disorderly conduct, resisting arrest and assault on an officer, the trial court did not err in allowing a police officer to testify that defendant was “talking very loud and boisterous” and “using very loud and boisterous language,” since an observer may testify to common appearances, facts and conditions in language which is descriptive of facts observed so as to enable one not an eyewitness to form an accurate judgment in regard thereto.

**6. Criminal Law § 88— cross-examination of arresting officer — irrelevant testimony**

In a prosecution for disorderly conduct, resisting arrest and assault on an officer, the trial court did not err in sustaining the solicitor’s objections to questions asked the arresting officer on cross-examination as to whether he had been involved in a scuffle at the jail with a prisoner, how many times he had been married, and whether he had visited the mental health clinic prior to the incident leading to the charges against defendant, the questions having called for irrelevant and immaterial testimony.

**7. Arrest and Bail § 6; Assault and Battery § 14— resisting arrest — assault on an officer — sufficiency of evidence**

The State’s evidence was sufficient to be submitted to the jury on issues of defendant’s guilt of resisting arrest and assault on an officer where it tended to show that when the officer arrested defendant at a hospital for disorderly conduct, defendant failed to submit peacefully to the lawful arrest after he had been advised and understood he was under arrest for disorderly conduct, and that defendant fought, struck and kicked the officer and forcibly left the hospital. G.S. 14-223; G.S. 14-33(b) (6).

**8. Disorderly Conduct and Public Drunkenness § 2— disorderly conduct — sufficiency of evidence**

The State’s evidence was sufficient to be submitted to the jury on the issue of defendant’s guilt of disorderly conduct where it tended to show that defendant created a public disturbance at a hospital by engaging in fighting and violent and threatening behavior and by using vulgar, profane and abusive language in such manner as to so arouse the average person as to create a breach of the peace.

**9. Indictment and Warrant § 12— amendment of warrant after defendant’s evidence**

The trial court did not err in allowing the solicitor to amend a warrant charging disorderly conduct after the State and defendant had rested, where the amendment did not change the nature of the offense charged in the original warrant.

APPEAL by defendant from *Martin (Robert M.)*, Judge,  
10 May 1971 Session of Superior Court held in PITT County.

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State v. Summrell

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The defendant Julius Stewart Summrell was charged in valid warrants with disorderly conduct, resisting arrest, and assault on an officer, in violation of G.S. 14-288.4, 14-223, and 14-33(b)(6). The defendant was found guilty of each of the three charges in the District Court of Pitt County. He was sentenced on the charges of assault and resisting arrest to six months imprisonment and on the charge of disorderly conduct to thirty days to begin at the expiration of the first sentence. From the judgments of the District Court, the defendant appealed to the Superior Court.

Upon defendant's pleas of not guilty in the Superior Court, evidence was offered tending to show that at approximately 5:00 p.m. on 6 July 1970 the defendant Julius Stewart Summrell, a black male, twenty-two years of age, was brought into the emergency room of Pitt County Memorial Hospital, Greenville, North Carolina. The defendant refused to give the nurse in attendance any information other than his name. After being called by the nurse, Dr. Vick, a member of the hospital staff who was on surgical call, came in to see the defendant; Summrell refused to be seen by Dr. Vick. He wanted to see Dr. Best, a black doctor. The nurse testified that she called Dr. Best at his office and residence and learned that he was not in. She testified: "I went back and explained to Mr. Summrell that I had called Dr. Best's office; that I could not reach him at the moment but I would keep trying. He got real indignant. He was cussing and saying he was in a lot of pain and he couldn't get any attention. At that time Officer—At the time I said he said he couldn't get any attention, Dr. Vick had been there prior to that time. At that time Officer Phillips was in the room with me and he told me to get out of the room, which I did. Mr. Summrell told me to get out."

When Officer Barley F. Phillips, a patrolman with the Greenville Police Department, arrived at the hospital emergency room to further his investigation of the auto accident in which the defendant was injured, the officer first obtained permission from Dr. Vick, the physician in charge, to talk to the injured parties.

After the nurse explained to the defendant what was being done to reach Dr. Best, Patrolman Phillips began his investigation with Mr. Wooten, the operator of one of the vehicles involved in the accident who was in a cubicle lying on a treat-

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State v. Summrell

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ment bed about four to five feet from the defendant. Patrolman Phillips testified that the defendant "was talking very loud and boisterous—using profane language"; that the defendant said to Miss Shaw, "get out of my face white woman"; and that although he continued to try to talk to Mr. Wooten and get a statement from him, he could not. The officer testified:

"I turned to Mr. Summrell and asked him to quiet down so I could finish my investigation and he, I advised him that if he didn't quiet down I would have to arrest him for disorderly conduct and carry him downtown after he was treated and he advised me I wasn't going to carry him any, I wasn't going to carry him any God damn where."

Another person in the waiting room testified that when Officer Phillips went into the defendant's room and began questioning him about the accident, the defendant said, "'I am not going to tell you a damn thing and don't nobody else tell him nothing.' . . . [H]e was talking in an unusually loud voice at that time."

The witness testified: "He still had a boisterous voice and was making loud noises. . . ." When Dr. Vick went in the defendant's room Summrell said: "I want a black doctor; I don't want a white doctor; I want Dr. Best. I want a doctor, you white folks don't care a thing about us negroes."

The officer got permission to move Mr. Wooten from the cubicle to a room across the hall where he could continue his investigation. The defendant's mother told the defendant to be quiet and the defendant replied, "that's the damn trouble now. We've been quiet too long." The defendant then got up from his bed and went out in the hall, stating that he was going to get out of "this damn hospital and go home or go somewhere." The officer told the defendant he was under arrest and that he did not have permission to leave the hospital. The defendant then advanced on the officer who grabbed his arm and they began to tussle. In the ensuing fight the defendant struck the officer with his fists and took his blackjack. The officer drew his revolver, stepped back, and told the defendant to put the blackjack down or he would fire; whereupon, the defendant threw the blackjack which struck the officer and knocked him to the floor.

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State v. Summrell

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The defendant again started to leave the hospital and the officer told him he was under arrest and could not leave. Officer Phillips tried to keep the defendant in custody while the defendant made his way to the main parking area in front of the hospital where he got in the rear seat of a car. When Phillips attempted to close the car door, the defendant threw the car door open, and in trying to avoid the door, Phillips tripped and fell. The defendant then grabbed him and tried to get the officer's gun. During the fight, the defendant was yelling, "get his gun; we'll kill the son-of-a-bitch; get his gun." Phillips testified: "... I was knocked to the ground and I was kicked. I was kicked from the waist up and from the waist, I was kicked on my whole right side. I kept receiving blows to the head and to my neck and chest area and I could feel myself getting weak. I knew I was weak then. ... My vision was blurred and I looked, and I saw Mr. Summrell with his fist clinched up and he started back towards me. ...

\* \* \*

"... I was hurting from my, my whole body was aching. ..." In the ensuing fight, the defendant was shot by the officer.

The defendant offered testimony wherein he admitted he was upset but that his words were due to the pain of the injuries suffered in the accident. He denied that he had been disorderly, that he had been placed under arrest, that he had resisted arrest, or that he committed any assault.

The jury found the defendant guilty of disorderly conduct, resisting arrest, and assault on an officer. From a judgment imposing a prison sentence of six months, the defendant appealed.

*Attorney General Robert Morgan by Associate Attorney James E. Wagner for the State.*

*Chambers, Stein, Ferguson and Lanning by Charles L. Becton; and Paul and Keenan by Jerry Paul for defendant appellant.*

HEDRICK, Judge.

[1, 2] In the cases charging resisting arrest and assault on an officer, the defendant assigns as error the court's denial of

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his motions to require the solicitor to elect, to quash the warrants, and to arrest the judgments. The defendant's motion made before the introduction of any evidence to require the solicitor to elect whether he would prosecute the defendant on the charge of resisting arrest or assault on an officer was properly denied. *State v. Stephens*, 170 N.C. 745, 87 S.E. 131 (1915); *State v. Smith*, 201 N.C. 494, 160 S.E. 577 (1931); *State v. Hall*, 214 N.C. 639, 200 S.E. 2d 375 (1939). A motion to quash challenges the sufficiency of a bill of indictment or warrant. 4 Strong, N.C. Index 2d, Indictment and Warrant, § 14, pp. 359-60. "A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record." *State v. McCollum*, 216 N.C. 737, 6 S.E. 2d 503." *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970). The defendant was charged in separate warrants with resisting arrest, in violation of G.S. 14-223, and with assault on an officer, in violation of G.S. 14-33(b) (6). The warrants charge the separate offenses in the language of the statute, no defect appears on the face of the warrants, and the face of the record proper discloses no fatal defect. The court properly denied the defendant's motions.

[3] Defendant's second contention is that the court erred in failing to quash the warrant charging disorderly conduct. He contends that G.S. 14-288.4(2) is "unconstitutionally vague and overbroad." The pertinent portions of G.S. 14-288.4 are as follows:

"Disorderly conduct is a public disturbance caused by any person who:

\* \* \*

(2) Makes any offensively coarse utterance, gesture, or display or uses abusive language, in such a manner as to alarm or disturb any person present or as to provoke a breach of the peace."

"It is settled law that a statute may be void for vagueness and uncertainty. . . . Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements

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are fully met. *United States v. Petrillo*, 332 U.S. 1, 91 L. ed. 1877, 67 S.Ct. 1538." *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970).

The statute provides an adequate warning of the conduct condemned and is sufficiently distinct for judges and juries to apply uniformly, and the court did not commit error by denying defendant's motion to quash the warrant which charged the offense in the language of the statute. This assignment of error is overruled.

[4] By his third assignment of error, the defendant contends that the court committed error by denying his motion "to see any and all exculpatory statements which the state had." "Pursuant to G.S. 15-155.4, the solicitor in a criminal trial is obligated to furnish certain specifically identified exhibits to the defendant to better enable him to prepare his defense. *State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286 (1970)." *State v. McDonald*, 11 N.C. App. 497, 181 S.E. 2d 744 (1971), *cert. den.* 279 N.C. 396 (1971).

There is nothing in this record to indicate that the State had any "exculpatory statements" in its possession, nor is there anything in the record to show that the defendant made any request for such statements or exhibits in accordance with the statute. Moreover, the record discloses that the defendant was given full opportunity to examine all of the State's witnesses prior to the trial. This assignment of error has no merit.

[5] The defendant's fourth assignment of error relates to the admission and exclusion of evidence. First, the defendant contends the court committed prejudicial error by allowing Officer Phillips to testify over defendant's objection that the defendant was "talking very loud and boisterous," and "using very loud and boisterous language." "An observer may testify to common appearances, facts and conditions in language which is descriptive of facts observed so as to enable one not an eyewitness to form an accurate judgment in regard thereto." *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). The record discloses that the officer was merely describing the manner in which the defendant was conducting himself in the emergency room. This exception has no merit.

Next, the defendant contends the court committed prejudicial error by allowing over defendant's objections (1) the solici-

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tor to ask a leading question, (2) a witness to give an answer which was not responsive to a question, (3) to go back over areas already covered, (4) to make a self-serving declaration, (5) to testify to facts not within her knowledge, and (6) to state conclusions. We have carefully examined each exception in the record upon which this contention is based and we find and hold that the court did not abuse its discretion in the conduct of the trial with respect to the admission and exclusion of the evidence challenged by these exceptions.

[6] The defendant contends the court committed prejudicial error by sustaining the State's objections to questions on cross-examination of Officer Phillips regarding (1) whether the witness had been involved in a scuffle at the jail with a prisoner two or three weeks prior to the incident at the hospital, (2) how many times the witness had been married, and (3) whether the witness had sometime prior to this event visited the mental health clinic. Clearly, these questions call for irrelevant and immaterial testimony and the solicitor's objections were properly sustained. We have carefully considered each exception embraced in the defendant's fourth assignment of error, and we find no prejudicial error in the court's admission and exclusion of testimony.

The defendant urges as error the court's denial of his motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of defendant's evidence. He grounds this assignment of error on the assertion in his brief: "The evidence shows that the defendant exerted his constitutional rights to resist an unlawful arrest." G.S. 15-41(1) provides: "A peace officer may without warrant arrest a person: (1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence."

In *State v. Cooper*, 4 N.C. App. 210, 166 S.E. 2d 509 (1969), Chief Judge Mallard wrote:

"When a person has been lawfully arrested by a lawful officer and understands that he is under arrest, it is his duty to submit peacefully to the arrest. *State v. Horner*, 139 N.C. 603, 52 S.E. 136. The words 'submit peacefully to arrest' imply the yielding to the authority of a lawful officer, after being lawfully arrested."

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[7, 8] When the evidence is considered in the light most favorable to the State, we hold it is sufficient to require the submission of these cases to the jury. There is evidence from which the jury could find that the defendant resisted, delayed, and obstructed Barley Phillips, a Police Officer of the City of Greenville, when the officer arrested him for disorderly conduct, by fighting, striking, and kicking the officer and by forcibly leaving the hospital, and by not submitting peaceably to a lawful arrest after he had been advised and understood that he was under arrest for disorderly conduct. There is also evidence from which the jury could find that the defendant assaulted the officer by striking and kicking him when the officer was undertaking to discharge the duties of his office. There is ample evidence from which the jury could find beyond a reasonable doubt that the defendant did create a public disturbance by engaging in fighting and violent and threatening behavior and by using vulgar, profane and abusive language in such a manner as to so arouse the average person as to create a breach of the peace. This assignment of error is overruled.

The defendant has brought forward several exceptions to the court's charge to the jury. A careful review of the charge in its entirety does not reveal any prejudicial error.

[9] The defendant asserts that the trial court erred in allowing the State to amend the disorderly conduct warrant during the court's charge to the jury. The record reveals that before any evidence was taken in the three cases, the defendant moved to quash the disorderly conduct warrant on the grounds that the statute, G.S. 14-288.4, was unconstitutional. In denying the defendant's motion, the court announced that it would interpret Section (2) of the statute as follows: "Makes any offensive coarse utterance, gesture or displays or uses abusive language in such manner as to so arouse the average person as to create a breach of the peace." The court then instructed the solicitor that he could amend the warrant in view of the court's interpretation of the statute. The record reveals the amendment was written into the warrant by the solicitor in the absence of the jury after the State and the defendant had rested. The superior court has discretion to allow a warrant to be amended as to form and substance before or after verdict, provided the amendment does not change the nature of the offense intended to be charged in the original warrant. *State v. Williams*, 1 N.C. App.

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**State v. Accor and State v. Moore**

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312, 161 S.E. 2d 198 (1968); *State v. Brown*, 225 N.C. 22, 33 S.E. 2d 121 (1945). In the instant case the amendment did not change the nature of the offense charged in the original warrant, and the court did not abuse its discretion in allowing the solicitor to amend.

We have carefully considered the remaining assignments of error based on the defendant's exceptions to the court's denial of his motions for mistrial, to set aside the verdict and in arrest of judgment, and we find that they are all without merit.

The defendant had a fair trial in the superior court free from prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

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STATE OF NORTH CAROLINA v. RICHARD WILLIAM ACCOR AND  
STATE OF NORTH CAROLINA v. WILLARD MOORE

No. 7127SC566

(Filed 15 December 1971)

**1. Criminal Law § 66—legality of in-court identification—witnesses' observation of defendants during the crime**

Trial court properly found that the identification of defendants as the perpetrators of first-degree burglary arose out of the witnesses' observations of the defendants during the burglary, and did not result from an illegal photographic identification, where there was evidence that the witnesses had struggled with the defendants for five or ten minutes during the time the defendants were in the witnesses' home, and that the area of the struggle was illuminated by the kitchen light.

**2. Criminal Law § 98—sequestration of witnesses—discretion of trial court**

The sequestration of witnesses is not a matter of right, but is a matter within the discretion of the trial judge, and the exercise of this discretion is not reviewable except in cases of abuse of discretion.

**3. Criminal Law §§ 21, 98—sequestration of State's witnesses—preliminary hearing**

Trial court's refusal to order the sequestration of the State's witnesses during the preliminary hearing was properly within its discretion.

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**State v. Accor and State v. Moore**

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**4. Burglary and Unlawful Breakings § 1—first-degree burglary — inference of intent to commit larceny**

In a prosecution for first-degree burglary or felonious breaking and entering, the alleged intent to commit larceny need not be executed but may be inferred from the circumstances surrounding the occurrence.

**5. Burglary and Unlawful Breakings § 2—lesser included crime of first-degree burglary — felonious breaking or entering**

The crime of felonious breaking or entering is a lesser included offense of first-degree burglary.

**6. Criminal Law § 115—conviction of lesser included offense — prerequisites**

A defendant may be convicted of a lesser included offense when the offense charged in the bill of indictment contains all of the essential elements of the lesser offense and when proof of the allegations in the indictment would prove all of the elements of the lesser offense.

**7. Burglary and Unlawful Breakings § 7—first-degree burglary — instruction as to guilt of felonious breaking and entering**

In a prosecution for first-degree burglary, it was proper for the trial court to instruct the jury that they could also return a verdict of guilty of felonious breaking and entering.

**8. Criminal Law § 171—erroneous submission of lesser offense — harmless error**

Defendant cannot be prejudiced by error in submitting the question of defendant's guilt of a lesser included crime of the offense charged.

**9. Criminal Law § 122—additional instructions after retirement of jury — statement that “someone is going to have to decide the case”**

Trial court's additional charge to the jury after the dinner recess, “If you don't reach a verdict, of course, it will be necessary that the case be tried again and someone is ultimately going to have to decide the case in Gaston County and I hope that it will be you,” held without error, especially since the court also included the admonition that no juror was to surrender his conscientious opinion.

**APPEAL** by defendants from *Thornburg*, *Special Judge*, 1 February 1971 Session of Superior Court held in GASTON County.

On 4 March 1969 at approximately 2:00 a.m. a house occupied by Mrs. Elizabeth Martin Carson, her parents, Mr. and Mrs. Witt Martin and her brother, James Martin, was entered by two men. Three of the occupants were awakened and surprised the two men in the kitchen. A struggle ensued and the two intruders departed.

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State v. Accor and State v. Moore

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On 5 March 1969 the defendants Richard Accor and Willard Moore were picked up for questioning on a matter not related to this case. Pictures were taken of the defendants at this time. Later that day the pictures, along with eleven others, were shown to Mrs. Elizabeth Carson and James and Witt Martin who identified the defendants as the two men who entered their house on 4 March 1969. Warrants were issued charging the defendants with first-degree burglary.

At the preliminary hearing on 10 April 1969 counsel for defendants made motions to sequester the witnesses for the State on the grounds that the ability of the witnesses to identify the defendants would be crucial at both the hearing and the trial. The motions were denied. Probable cause was found and defendants were bound over to superior court.

The Grand Jury returned indictments charging the defendants with first-degree burglary. The defendants were brought to trial and found guilty of first-degree burglary on 11 June 1969. On appeal the North Carolina Supreme Court ordered a new trial. *State v. Accor and State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970).

At the second trial the trial judge conducted a voir dire examination on the admissibility of the identification testimony of Mrs. Carson and James and Witt Martin. Based on the evidence presented on voir dire, the court made findings of fact and concluded as a matter of law that the photographs displayed to the witnesses were illegally obtained and inadmissible as evidence; that the testimony of Mrs. Elizabeth Carson as to the identities of the defendants was inadmissible in that it did not meet the standards for in-court identification established by the State and Federal Courts; that Witt Martin and James Martin could make in-court identifications, their identifications having been determined by the court to be of independent origin and not tainted by the photographs referred to.

The State presented evidence tending to show that Mrs. Carson was awakened at about 2:00 a.m. on 4 March 1969 by noises. She awoke her father, Witt Martin, and they went to the kitchen and turned on the light. They saw two men in the kitchen. Witt Martin identified the defendants as being the two men he saw in the kitchen. One of the men then struck Witt Martin and knocked him back into the bedroom. James Martin

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was awakened by the disturbance and went to the kitchen. He was attacked by one of the men who stabbed and cut him several times. James Martin identified the defendants as the men he saw when he reached the kitchen. Witt Martin rejoined the struggle and struck the man attacking James. Mrs. Elizabeth Carson was hitting the other intruder with the telephone receiver. One of the intruders then grabbed Mrs. Carson and dragged her to the back door where he released her, and both men fled. The struggle lasted five to ten minutes. The struggle occurred in the kitchen and an adjoining hallway which was lighted by a small night light.

The defendants introduced evidence tending to show that they had gone to Charlotte on the afternoon of 3 March 1969 and spent the afternoon drinking. They returned to Gastonia in the evening and visited several places where they had more to drink. They took a taxi home. The taxi driver put the defendants out at a point between their respective homes. At this time a police officer stopped and settled a brief argument between the defendants and the taxi driver. The defendants went to their homes, arriving shortly before 2:00 a.m., and remained at their homes until the following morning. The defendants testified that they had never been in the residence occupied by Mrs. Carson and the Martins and that they had never seen Mrs. Carson or the Martins until the preliminary hearing in this case. Other witnesses gave testimony tending to corroborate the testimony of the defendants as to their whereabouts on the evening of March 3 and morning of March 4, 1969.

The trial court instructed the jury that it could return as to each defendant, one of the four following verdicts: (1) Guilty of burglary in the first degree with recommendation of life imprisonment; (2) guilty of felonious breaking or entering; (3) guilty of breaking or entering without intent to commit a felony; and (4) not guilty.

The jury retired at 6:05 p.m. At 7:45 p.m. the court sent for the jury, and, upon finding that no verdict had been reached, recessed for dinner. The jury returned at 9:00 p.m. and the court gave an additional instruction which read in part:

“ \* \* \* You have not been out long up to this point but I do hope that you and members of this jury will be able to reach a verdict as to each defendant. Coming as

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you do from all parts of Gaston County, certainly you represent a cross section of the County, and certainly you are as intelligent a jury as we would ever hope to have to hear the evidence in the case. If you don't reach a verdict, of course, it will be necessary that the case be tried again and someone ultimately is going to have to decide this case in Gaston County and I hope it will be you. I am not asking either of you at any time to surrender any conscientious opinion that he or she may have as to how the verdict should be reached as to each defendant, but I am asking you to do your very conscientious best to reach a verdict in this case as to each defendant. \* \* \*

The jury retired again and returned at 11:10 p.m. The verdict as to each defendant, was guilty of felonious breaking or entering. The court entered judgments imposing prison sentences on each defendant. From these judgments, the defendants appeal.

*Attorney General Robert Morgan by Associate Attorney Walter E. Ricks III for the State.*

*Chambers, Stein, Ferguson and Lanning by Adam Stein and James E. Ferguson for defendant appellants.*

VAUGHN, Judge.

The defendants, in essence, raise three questions on appeal.

1. Whether error was committed when the trial court allowed the in-court identification of defendants by the State's witnesses and when, at the preliminary hearing, the court denied defendants' motion to sequester the State's witnesses.

2. Whether the trial court committed error by instructing the jury that it could return verdicts of either first-degree burglary or felonious breaking or entering.

3. Whether the trial court committed error by its additional instructions to the jury after the dinner recess.

The defendants challenge the in-court identification by Witt and James Martin on two grounds.

First, it is argued that the defendants' rights to counsel were violated when the police displayed their photographs to the Martins without having counsel present and therefore the sub-

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sequent in-court identifications of the Martins were tainted and inadmissible. On the second point, the defendants argue that their motion to sequester the State's witnesses at the preliminary hearing should have been granted and that the failure of the court to do so deprived the defendants of the opportunity to test the independence of the witnesses' testimony.

[1] The law applicable to the in-court identifications in this case is well established. Where the defendant objects to the in-court identification on the grounds that it is tainted by illegal pre-trial procedures, the proper course is for the trial court to conduct a voir dire examination to determine whether the identification flows from the illegality or has an independent origin. *United States v. Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149, 87 S.Ct. 1926 (1967). The burden of proof is on the State to establish the independent origin of the identification, but, if it can carry the burden, the in-court identification may be admitted notwithstanding the illegal pre-trial procedure. *United States v. Wade, supra*. In this case the defendants complain that the in-court identifications by the Martins and Mrs. Carson were tainted by the display of photographs alleged to have been illegally obtained. Upon objection by defendants, the court conducted a voir dire examination of the witnesses. The voir dire was lengthy and comprehensive. The judge made findings of fact and concluded as a matter of law that the photographs displayed to the witnesses were illegally obtained and were inadmissible as evidence; that the identification testimony of Elizabeth Carson was inadmissible by reason of the fact that it did not meet the standards for in-court identification established by the State and Federal Courts; that Witt Martin and James Martin could make in-court identifications, their identifications having been determined to be of independent origin and not tainted by the photographs referred to. Based on these conclusions of law, the trial judge allowed Witt and James Martin to make in-court identifications of the defendants. The procedures followed by the trial court meet the procedures established by *United States v. Wade, supra*, and *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581. There is evidence in the record to support the trial court's conclusion that the identifications of the defendants by Witt and James Martin had origins independent of the photographic display. Each witness had observed the defendants during the confrontation and ensuing struggle on

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State v. Accor and State v. Moore

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4 March 1969. The area in which the struggle occurred was illuminated by the kitchen light. The fight lasted from five to ten minutes. The trial judge made findings of fact based on this evidence. The findings are conclusive if supported by competent evidence and no reviewing court may set aside or modify such findings. *State v. Wright, supra*; *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1, cert. den. 386 U.S. 911, 87 S.Ct. 860, 17 L. Ed. 2d 784 (1966). We find no error in the trial court's admission of the identification testimony of James and Witt Martin.

[2, 3] The defendants next argue that the court erred when it denied the defendants' motions to sequester the State's witnesses. North Carolina follows the rule that the sequestration of witnesses is not a matter of right, but is a matter within the discretion of the trial judge. The exercise of this discretion is not reviewable except in cases of abuse of discretion. *State v. Spencer*, 239 N.C. 604, 80 S.E. 2d 670 (1954); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970). No abuse of discretion appears.

[4] The defendants next contend that it was error to submit to the jury either first-degree burglary or felonious breaking or entering because there was no evidence of an intent to commit larceny. This intent need not be executed. The intent may be inferred from the circumstances surrounding the occurrence. *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968). In *State v. Accor and State v. Moore, supra*, the Supreme Court found from the circumstances sufficient evidence of intent to commit larceny for submission of the question of intent to the jury. The Court quoted with approval the following from *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887).

" \* \* \* "The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. Here there was no larceny or

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State v. Accor and State v. Moore

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other felony actually committed, and the guilt, if any, consisted in the *intent* to commit a felony, which was not consummated. \* \* \* ’’

The defendants contend that the decision in *State v. Accor* and *State v. Moore*, *supra*, was contrary to the decision in *State v. Thorpe*, *supra*, and *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923). We disagree. In *State v. Thorpe*, *supra*, the Court held that the indictment must allege and the prosecution must prove the specific felonious intent held by the accused at the time of the breaking and entering. The Court stated that intent may be inferred from the circumstances and that the jury must draw the inferences. In the present case the indictment specified the intent to commit larceny and there is sufficient evidence to permit the jury to find that intent. The *Allen* case imposes no more stringent requirement than that followed in *Thorpe* and *State v. Accor* and *State v. Moore*, *supra*. We find no error in submitting the charges of first-degree burglary and felonious breaking or entering to the jury.

[5-8] The defendants contend that it was error for the trial court to instruct the jury on felonious breaking or entering and to permit the jury to return that verdict. The defendants argue that the only three verdicts the jury could have returned on the evidence in this case were not guilty, guilty of non-felonious breaking or entering, or guilty of first-degree burglary. We do not agree. The crime of felonious breaking or entering is a lesser included offense of first-degree burglary. *State v. Gaston*, 4 N.C. App. 575, 167 S.E. 2d 510 (1969). A defendant may be convicted of a lesser included offense when the offense charged in the bill of indictment contains all of the essential elements of the lesser offense and when proof of the allegations in the indictment would prove all of the elements of the lesser offense. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). In the case before us the indictment alleged all of the elements of felonious breaking or entering and there is sufficient evidence of the elements of that offense to support a conviction. The charge on the lesser included offense was favorable to defendants and had it been error, it would have been error in favor of the defendants, and they cannot complain that it is prejudicial. *State v. Chase*, 231 N.C. 589, 58 S.E. 2d 364 (1950). It was not reversible error for the trial court to instruct the jury on felonious breaking or entering.

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State v. Accor and State v. Moore

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[9] The defendants' final argument is that the additional charge given the jury after the dinner recess was error. Defendants contend that the trial court's instruction that, "If you don't reach a verdict, of course, it will be necessary that the case be tried again and someone is ultimately going to have to decide the case in Gaston County and I hope that will be you," was an erroneous extension of the instruction approved in *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L. Ed. 528. It is proper to use the so-called *Allen* charge to suggest to the jury the desirability of reaching a verdict provided it is made clear that the verdict must represent the judgment of each juror and not result from the surrender by any juror of his conscientious opinion. *Rhodes v. United States*, 282 F. 2d 59, cert. den. 364 U.S. 912, 81 S.Ct. 275, 5 L. Ed. 2d 226 (1960). To prevent its being coercive, the *Allen* charge must include the admonition that no juror is to surrender his conscientious opinion. *United States v. Rogers*, 289 F. 2d 433 (1961); *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767 (1966). The charge before us included such an admonition in the words of the trial court that, "I am not asking either of you at anytime to surrender any conscientious opinion that he or she may have as to how the verdict should be reached as to each defendant." The trial court made it clear that no juror was to surrender his opinion. The defendants argue that the trial court erred in suggesting to the jury that, "someone is ultimately going to have to decide this case in Gaston County, and I hope it will be you." In *Fulwood v. United States*, 369 F. 2d 960, cert. den. 387 U.S. 934, 87 S.Ct. 2058, 18 L. Ed. 2d 996 (1966), the United States Court of Appeals for the District of Columbia Circuit approved a charge containing the statement that, "some jury some time will have the duty to decide this case, and I hope that you, as the jury in this case, will be able to decide this matter." In *Fulwood* the Court said of this part of the charge:

" \* \* \* This statement could not reasonably have any coercive effect. It is merely a legitimate expression of a hope that the jury would decide the case if it could. The statement that some other jury would have to decide the case if this one could not was accurate as a generality and, in any event, could have had no coercive impact on the jury. \* \* \* "

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White v. Vananda

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We can see no significant difference between the charge in *Fulwood* and that in the case before us. We agree with the *Fulwood* court that the instruction is not coercive.

The defendants rely on the case of *United States v. Harris*, 391 F. 2d 348, cert. den. 393 U.S. 874, 89 S.Ct. 169, 21 L. Ed. 2d 145 (1968) in which a charge containing similar words was held to be error. In distinguishing the charge before it from the charge in *Fulwood*, and other cases, The Court in *Harris* said, "We are of the opinion however that the supplemental charge in this case, given under the circumstances then existing, was more coercive in nature than were the instructions in those cases." Two of the circumstances referred to by the Court were that the jury was told that a previous jury had failed to agree and that the jury had deliberated from 11:40 a.m. until 4:55 p.m. the previous day without reaching a verdict but returned a verdict within a short time after receiving the additional charge. In the case before us the jury was not told that it was a second trial. The jury in this case had been out only one hour and forty minutes prior to the supplemental instruction and remained out for another hour and forty minutes thereafter. This is not indicative of any coercive effect on the jury.

Considering the instructions in their entirety and the circumstances in which they were given, we find no error in the trial court's charge to the jury.

All of defendants' assignments of error have been carefully considered. In the trial we find no error.

No error.

Judges MORRIS and PARKER concur.

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GEORGE THOMAS WHITE v. WILLIAM E. VANANDA

No. 7128SC665

(Filed 15 December 1971)

**1. Automobiles § 53—driving on wrong side of road**

Plaintiff's evidence that the collision in question occurred when defendant's son drove left of the center of the highway made a *prima facie* case of actionable negligence on the son's part.

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**White v. Vananda**

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**2. Automobiles § 108—family purpose doctrine—accident in this State—nonresident driver**

The family purpose doctrine as enunciated in this State, rather than as declared in the state of defendant's residence, must be considered in determining if the doctrine is applicable to a collision which occurred in this State.

**3. Automobiles § 108—family purpose doctrine**

Under the family purpose doctrine, the head of a household who owns, keeps, provides or maintains an automobile for the convenience and pleasure of his family is liable for injuries caused by the negligent operation of the vehicle by any member of his family who is using the vehicle for the purpose for which it was provided.

**4. Automobiles § 108—family purpose doctrine—adult child**

The family purpose doctrine is not confined to situations involving parent and minor child but applies with equal force when the child is an adult.

**5. Automobiles § 108—family purpose doctrine—car driven by son in armed forces**

In this action to recover damages for personal injuries sustained in a collision between plaintiff's automobile and an automobile owned by defendant but operated by defendant's son, the fact that at the time of the collision defendant's son was serving in the armed forces and was not dependent upon his father for support does not as a matter of law exclude him from membership in his father's family within the meaning of the family purpose doctrine, and it was for the jury to determine whether at the time of the collision he yet remained within the family group for the purpose of applying that doctrine.

**6. Automobiles § 105—automobile accident—respondeat superior—proof of ownership and registration**

Plaintiff was entitled to have submitted to the jury his action to recover against defendant for personal injuries received in a collision with an automobile driven by defendant's son, where defendant admitted ownership of the automobile driven by his son and conceded that it was registered in his name. G.S. 20-71.1(a) and (b).

APPEAL by plaintiff from *Martin (Harry C.)*, Judge, 19 April 1971 Session of Superior Court held in BUNCOMBE County.

Civil action to recover damages for personal injuries sustained by plaintiff in an automobile collision between a car owned and operated by plaintiff and an automobile owned by defendant but operated by defendant's son, William Ronald Vananda. (It appears that William Ronald Vananda died as a result of the collision. His estate is not a party to this litigation.) The collision occurred on the afternoon of 12 May 1968

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on U. S. Highway No. 64 in Catawba County at a point approximately one mile west of the city limits of Hickory. At that point the highway is a four-lane highway 52 feet wide, with two lanes for eastbound and two lanes for westbound traffic. There is no median, the lanes being separated only by lines painted on the pavement. The posted speed limit was 55 miles per hour. Plaintiff alleged and offered evidence to show that the collision occurred when plaintiff's automobile, which he was driving westward in the right-hand westbound lane at a speed between 40 and 45 miles per hour, was struck by a 1965 Chevrolet automobile which, while being driven by defendant's son in an eastward direction on Highway 64, crossed over the center line and into plaintiff's lane of travel and struck the left front of plaintiff's automobile, injuring him. The evidence would indicate that plaintiff was the only occupant of his vehicle and that defendant's son was the only occupant of the 1965 Chevrolet.

Plaintiff alleged and defendant admitted that defendant was the owner of the 1965 Chevrolet being driven by his son and that the Chevrolet was registered for the year 1968 with the Department of Motor Vehicles for the State of Tennessee. (The allegation of the complaint admitted by the answer does not make it entirely clear that defendant's vehicle was registered *in the name of the defendant*, but defendant's counsel in their brief state that it was registered in defendant's name.) Plaintiff also alleged, but defendant denied, that: (1) at the time of the accident defendant's son, William Ronald Vananda, was operating the 1965 Chevrolet as the agent of defendant and was acting within the course and scope of his employment; and (2) defendant owned, maintained and provided the 1965 Chevrolet for the general use, pleasure and convenience of his family and particularly his son, William Ronald Vananda, and at the time of the accident defendant's son was using the vehicle for family purposes.

At the trial plaintiff introduced in evidence the deposition of defendant, who testified in substance to the following facts: Defendant lived in Townsend, Tennessee, and engaged in business in Tennessee. William Ronald Vananda was his oldest son, and he had three younger children, all boys, who on 12 May 1968 were respectively 18, 15 and 11 years of age. In September 1966 William Ronald Vananda, after having

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attended college for two quarters, volunteered and enlisted in the Marines for a three-year enlistment period. He served in Viet Nam, attained the rank of corporal, and in May 1968 was stationed at Camp Lejeune. He would have been discharged from service in September 1969, at the end of his three-year enlistment period. He was not married. When he had attended college prior to enlisting, his father had provided for his educational expenses. It was his intention to return to college after completing his military service, but in that event he would have had the benefits of the G.I. Bill and his father would not again have provided for his educational expenses. When on leave from military service, he came home and stayed in his father's residence without being required to pay room and board, but his father did not provide for any of his other expenses. About three weeks prior to 12 May 1968 he had been home for an overnight visit and on that occasion had taken his clothes back to camp with him. He next returned home on Saturday, 11 May 1968, getting a ride with friends, and he left home around noon on Sunday, 12 May 1968. He was returning to Camp Lejeune when the collision occurred.

The 1965 Chevrolet which William Ronald Vananda was driving had been purchased new by defendant in 1965 and defendant had had it right up until the time of the accident. It was not used in defendant's business and was purchased by defendant mainly for use by his wife, who used it principally to drive back and forth to work. Defendant's wife participated in selecting the 1965 Chevrolet and in paying for it, and she participated in buying gasoline and providing for it. In May 1968 defendant also had two other cars, a 1956 Chevrolet and a 1961 Ford station wagon. The 1956 Chevrolet had been selected and purchased by William Ronald Vananda, and that was the car he drove when home on leave. On occasion he, as did also the second oldest boy, drove the 1965 Chevrolet by special permission "if they really needed the car for something," but usually they drove the 1956 Chevrolet or the 1961 Ford station wagon. On the occasion the accident occurred, William Ronald Vananda had special permission to use the 1965 Chevrolet, which was a newer automobile, to drive back to camp. At that time he was supposed to return home again in two weeks, and had permission to drive the car to the base and back home again. (In his deposition, defendant testified on direct examination by plaintiff's counsel that he had allowed his son to take the 1965

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Chevrolet with him and that his son had defendant's permission to use it on the occasion in question. On cross-examination by his own counsel, defendant testified that arrangements for use of the car on this occasion were made between his son and the boy's mother, defendant's wife.)

At the conclusion of plaintiff's evidence, defendant moved for a directed verdict, and from judgment allowing the motion and dismissing the action, plaintiff appealed.

*Riddle & Shackelford by John E. Shackelford for plaintiff appellant.*

*Van Winkle, Buck, Wall, Starnes & Hyde by O. E. Starnes, Jr.; and Uzzell & Dumont by Harry Dumont for defendant appellee.*

PARKER, Judge.

[1] Plaintiff's evidence that the collision occurred when defendant's son drove left of the center of the highway made a *prima facie* case of actionable negligence on the son's part, *Lassiter v. Williams*, 272 N.C. 473, 158 S.E. 2d 593; *Anderson v. Webb*, 267 N.C. 745, 148 S.E. 2d 846, and the only question presented by this appeal is whether the evidence was sufficient to require the jury to pass upon an issue as to defendant's responsibility for his son's actions. We think that it was.

[2, 3] Since the collision occurred in North Carolina, the family purpose doctrine as enunciated in this State rather than as declared in the State of defendant's residence must be considered in determining if the doctrine is applicable under the facts of this case. *Goode v. Barton*, 238 N.C. 492, 78 S.E. 2d 398. In discussing that doctrine, Moore, J., speaking for our Supreme Court in *Grindstaff v. Watts*, 254 N.C. 568, 571, 119 S.E. 2d 784, 787, said:

"The family purpose doctrine is an anomaly in the law. When the facts essential to invoke the doctrine are established by the verdict or admitted, an irrebuttable presumption arises that the family member operator was the agent of the family member owner and acted pursuant to and within the scope of the agency. 'The doctrine is an extension of the principle of *respondeat superior*. . . .' 38 N. C. Law Review, 249, 250. In this State it is not the re-

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sult of legislative action, but is a rule of law adopted by the Court."

The doctrine has been stated and restated many times by our Supreme Court "and, collectively, the cases define it as follows: Where the head of a household owns, keeps, provides, or maintains an automobile for the convenience and pleasure of his family, he is liable for the injuries caused by the negligent operation of the vehicle by any member of his family who is using the vehicle for the purpose for which it was provided." Sharp, J., in dissenting opinion in *Smith v. Simpson*, 260 N.C. 601, 614, 133 S.E. 2d 474, 484.

In the present case defendant has admitted ownership of the car which his son was driving. He testified that he provided it for the convenience and pleasure primarily of his wife, but that at times it was also used by special permission by the two oldest boys, who were of an age to drive, "if they really needed the car for something." He testified that his son, William Ronald Vananda, had special permission to use the car for the purpose for which it was being used and on the occasion when the collision occurred. The only real question presented by this appeal is whether, under the facts disclosed by the evidence, the jury could legitimately find that William Ronald Vananda was, at the time of the collision, a member of his father's family for purposes of applying the family purpose doctrine. When the evidence is viewed in the light most favorable to the plaintiff, as it must be in passing upon the correctness of the directed verdict against him, *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396, we think that the jury could so find.

[4, 5] At the outset we observe that while the record does not disclose how old William was at the time of the accident, the family purpose doctrine "is not confined to situations involving parent and minor child. It applies with equal force when the child is an adult," *Smith v. Simpson*, *supra*, for "the parent is under no more legal obligation to supply an automobile for the use and pleasure of a minor child than he is for the use and pleasure of an adult child." *Watts v. Lefler*, 190 N.C. 722, 130 S.E. 630. Nor do we think that the fact that at the time of the collision William was serving in the armed forces and for the period of his enlistment was not dependent upon his father for support should, as a matter of law, exclude him from membership in his father's family as that group is conceived of in apply-

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ing the family purpose doctrine. To so hold would in these times automatically exclude from the family group thousands of young men whose relationship with their parents and within the family group, and whose financial responsibility, has undergone no real change. The case now before us, as indeed every case involving a possible application of the family purpose doctrine, must be considered in the light of its own particular facts. Viewing those facts in the light most favorable to plaintiff, we hold that the son's military service in the present case did not as a matter of law compel the conclusion that he had ceased to be a member of his father's family within the meaning of the family purpose doctrine, and it was for the jury to determine, under proper instructions from the court, whether at the time of the collision he yet remained within the family group for purpose of applying that doctrine. There was here evidence that he did not intend to make the service his career, and that when his duty permitted he returned to his father's home and resumed his position as a member of the household. While we find no case in which the Supreme Court of North Carolina has passed upon the precise question here presented, the holding of the Supreme Court of Georgia in *Dunn v. Caylor*, 218 Ga. 256, 127 S.E. 2d 367, seems entirely consistent with the family purpose doctrine as enunciated in our own State. In that case the Court said:

"Every case concerning the application of the family purpose doctrine must stand upon its own facts as to what the parent has voluntarily assumed as a part of the business to which he will devote himself and to which he will have his vehicle applied. The extent to which an automobile may be used for the comfort and pleasure of the family is a question to be settled by the parent and it is also a matter for the parent's determination as to whether a son home from military service would be included among those whose comfort and pleasure would be promoted by the use of the vehicle. A parent is not relieved from liability merely because a child is an adult or self-sustaining."

[6] Apart from the family purpose doctrine, plaintiff was entitled to have his case submitted to the jury. Defendant admitted ownership of the 1965 Chevrolet and conceded that it was registered in his name. By G.S. 20-71.1(a), in this action to recover damages for personal injuries, establishment of the fact of ownership of defendant's vehicle at the time of the collision

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"shall be prima facie evidence that such motor vehicle was being operated and used with the authority, consent, and knowledge of the owner in the very transaction out of which said injury or cause of action arose." By G.S. 20-71.1(b), establishment of the fact of registration of the vehicle in defendant's name, shall "be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment." *Taylor v. Parks*, 254 N.C. 266, 118 S.E. 2d 779, relied on by defendant, is not here applicable. In that case, G.S. 20-71.1(b) was not involved for the reason that plaintiff there had neither allegation nor proof as to registration of the vehicle involved. In that case, plaintiff offered evidence, "clear, convincing and uncontradicted," that at the time of the collision the automobile was being operated without the defendant owner's authority, consent and knowledge, and that the driver was not at the time the defendant's agent, servant or employee acting in the course and scope of his employment in the transaction out of which plaintiff's injuries arose. Our Supreme Court held that such evidence overcame the statutory rule of evidence created by G.S. 20-71.1(a). In the case now before us, plaintiff's evidence was entirely consistent with the statutory rule of evidence created by G.S. 20-71.1(a) and was not so clearly inconsistent with the statutory rule of evidence created by G.S. 20-71.1(b) as to make that section inapplicable.

For the foregoing reasons, the judgment directing verdict against plaintiff must be and is

Reversed.

Judges MORRIS and GRAHAM concur.

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College v. Thorne

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LENOIR RHYNE COLLEGE, SAM T. THORNE, WILLIAM D. LYERLY, AND MYRTICE C. LOCHMANN v. ELEANOR GALLOWAY THORNE, GUARDIAN AD LITEM FOR NANCY BETH THORNE, MINOR, AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA, EXECUTOR OF THE WILL AND ESTATE OF HELEN L. RIEGEL, DECEASED

No. 7126SC689

(Filed 15 December 1971)

**1. Appeal and Error § 26— exception to the judgment— question presented on appeal**

An exception to the entry of judgment presents the single question whether the facts found by the court are sufficient to support the judgment.

**2. Executors and Administrators § 33— family agreements**

The courts generally look with favor upon family settlement agreements whereby a will contest is avoided or the settlement and distribution of an estate is promoted.

**3. Executors and Administrators § 33— family settlement agreement— approval by the trial court**

The trial court properly approved a family settlement agreement which modified certain dispositive provisions of a testatrix' will and withdrew from probate a holographic codicil purportedly executed by the testatrix, which codicil, found among the testatrix' unopened mail, had revoked bequests to a stepbrother and his minor daughter, where (1) a bona fide controversy existed as to whether the holographic document was among the valuable papers of the testatrix; (2) there was a possibility that the codicil had been procured by fraud; (3) a caveat proceeding would have resulted in substantial expense to the estate and disruption of family harmony; (4) the agreement was fair to all parties and did not affect the rights of creditors; (5) although the minor daughter gave up the right to receive the principal of a \$10,000 bequest, she retained the income therefrom until she became 21 years old.

**4. Wills § 4— holographic will— requirement that will be among valuable papers of testatrix**

A bona fide controversy existed as to whether a holographic document was found among the valuable papers and effects of the testatrix, where the document was discovered among some unopened mail on a sofa at the testatrix' home, in a small room which was used as an office. G.S. 31-3.4.

APPEAL by defendants from *Blount, Judge*, 31 May 1971 Session of Superior Court held in MECKLENBURG County.

This is a civil action to obtain court approval of a written settlement agreement dated 20 November 1969 which modifies

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some of the dispositive provisions of the will of Helen L. Riegel, deceased, and withdraws from probate a purported holographic codicil thereto. All persons affected by the settlement agreement were made parties and the case was submitted on the pleadings and on stipulations. Pertinent facts may be summarized as follows:

Helen L. Riegel, a resident of Mecklenburg County, died 2 August 1968 leaving an estate valued at approximately \$440,000.00. An attested will dated 21 August 1964 and an attested codicil thereto dated 13 January 1965 were found upon inventory of her bank lockbox. These documents (which are together hereinafter referred to as the "Will") were probated in common form on 12 August 1968. Insofar as pertinent to this appeal, the dispositive provisions of the Will were as follows:

"ITEM III

To each of the following persons who shall survive me I give, devise and bequeath the following of my possessions:

(a) To my niece, NANCY BETH THORNE, of Charlotte, North Carolina, (i) Ten Thousand (\$10,000) Dollars; (ii) my Grandmother's chest; (iii) Harry J. Riegel's family corner chair; (iv) my French commode and mirror; (v) my English glass-enclosed treasure chest; (vi) all of my sterling silver; and (vii) all of my jewelry, including but not limited to all of my rings and watches;

\* \* \* \* \*

(c) To SAM T. THORNE, of Charlotte, North Carolina, Ten Thousand (\$10,000) Dollars;

\* \* \* \* \*

ITEM IV

If either my father, WILLIAM D. LYERLY, or my cousin, MYRTICE C. LOCHMANN, survives me, I give, devise, bequeath and appoint all of the rest, residue and remainder of my estate, real, personal, mixed or otherwise, including but not limited to all stocks, bonds, securities, moneys, and other property of which I die seized or possessed, or to which I am in any way entitled at the time of my death, or over which I then have any power of appointment by will (including all lapsed legacies and devises), to be held and

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administered by my Trustee and finally distributed by my Trustee upon the trusts hereinafter set forth in this Item IV:

(a) My Trustee shall pay to or for my cousin, MYRTICE C. LOCHMANN, during her lifetime out of the net income of this trust the amount of Two Hundred (\$200) Dollars per month.

(b) My Trustee shall pay to or for my father, WILLIAM D. LYERLY, during his lifetime, all of the remainder of the net income of this trust in quarterly installments. If my Trustee at any time in its absolute

Page 2

Will of Helen L. Riegel

/s/ Helen L. Riegel

discretion shall determine that the income of my father from this trust, when supplemented by income available to him from all other sources, is insufficient for his needs in connection with any sickness, accident or other emergency or unusual expense, my Trustee may pay to or for my father from the principal of this trust such sum or sums as my Trustee may consider necessary or desirable for such purposes.

(c) Upon the death of the last to survive of my father, WILLIAM D. LYERLY, and my cousin, MYRTICE C. LOCHMANN, my Trustee shall pay over and distribute, free of this trust, all of the then remaining principal and undistributed income, if any, of this trust as follows:

(i) Fifteen Thousand (\$15,000) Dollars to SAM T. THORNE;

(ii) One-third (1/3) of the remainder after the foregoing bequest to SAM T. THORNE, to my niece, NANCY BETH THORNE; and

(iii) Two-thirds (2/3) of the remainder after the foregoing bequest to SAM T. THORNE, to the Trustees of LENOIR RHYNE COLLEGE, Hickory, North Carolina, to be used by said Trustees to establish the Harry J. Riegel and Helen L. Riegel Memorial Fund, the net income from which may be, in the sole and uncontrolled discretion of said

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Trustees, used for the benefit of said LENOIR RHYNE COLLEGE, its faculty or students, without restrictions.”

Nancy Beth Thorne, the beneficiary named in Item III(a) and Item IV(c) (ii), is the minor daughter of Sam T. Thorne, the beneficiary named in Item III(c) and in Item IV(c) (i). William D. Lyerly, father of the testatrix, and Myrtice C. Lochmann, her cousin, survived the testatrix. The will named First Union National Bank of North Carolina (the Bank) as Executor and as Trustee of the trust estate created by the Will, and the Bank qualified as Executor on 13 August 1968 and stands ready to act as Trustee under the Will.

Shortly after inventory of the lockbox was made, a Trust Officer of the Bank found at the home of Helen L. Riegel on a sofa, among some unopened mail, in a small room used as an office by Helen L. Riegel, a sealed envelope on which was typed “Mrs. Riegel” and on which was written in pencil the words “My Will.” This envelope contained a conformed copy of the attested will dated 21 August 1964, to which was attached by paper clip a single sheet of paper, bearing writing on both sides, which writing bears the signature “Helen L. Riegel” and which writing is purported to be a holographic codicil to the Will. This writing reads as follows:

“March 21, 1967

When we were at the beach, Windy Hill, S. C., Ethel told Cousin Myrtice C. Lochmann that Sam & Eleanor Thorne, my step-brother and his wife, Do not like me. In view of this information I do not want either they or their daughter Nancy Beth to have any part of my estate. The provision that I had made for them I want to go to Myrtice C. Lochmann for her life time then into my estate to be given to Lenoir Rhyne College for the H. J. Riegel Trust.

HELEN L. RIEGEL”

The Bank, seeking to determine the authenticity of this paper writing, on 16 September 1968 filed a petition with the clerk of Superior Court of Mecklenburg County for its probate in solemn form as a codicil to the Will, and a citation to see the probate proceedings together with a copy of the petition was duly served on all interested parties. Probate proceedings were convened before the clerk on 8 October 1968, at which all in-

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interested parties were present and represented by counsel, Eleanor Galloway Thorne, mother of Nancy Beth Thorne, having been appointed guardian ad litem to represent the interest of her minor daughter. Testimony was taken from the Trust Officer of the Bank who found the paper writing, and the handwriting of Helen L. Riegel and her signature were identified by three witnesses. Upon denial of motion made by the counsel for Sam T. Thorne and Nancy Beth Thorne that the holograph not be probated, counsel announced his intention to challenge the validity of the purported codicil on the ground that it was not found among the valuable papers of Helen L. Riegel as required by G.S. 31-3.4(a) (3) and on the grounds of undue influence and fraud, and to request certification of the issues thus raised to the Superior Court for trial by a jury. Counsel for all parties then agreed that the probate proceedings be adjourned so that the interested parties might discuss the possibility of settlement, and motion to adjourn was allowed. Thereupon counsel for all interested parties entered into negotiations in an attempt to reach a settlement which would avoid the expense, embarrassment and family disharmony which would result from the trial of the issues of undue influence and fraud and such other issues as might develop. As a result of these negotiations the parties reached an agreement and reduced their agreement to writing dated 20 November 1969. By the terms of this instrument the parties agreed that, if the court should approve the settlement agreement, the purported holographic codicil should be withdrawn from probate and the parties would abide by the terms of the Will, as amended and modified only in the following particulars:

“(a) The bequest of \$10,000 in Item III (a) (i) of the Will to Nancy Beth Thorne be limited to the income therefrom until her death or until she reaches age twenty-one (21), whichever event shall first occur, the \$10,000 to be then paid to Lenoir Rhyne College;

(b) An additional cash payment of \$4,575.95 is to be paid to Myrtice C. Lochmann, which sum shall be payable from the residuary of the Helen L. Riegel Estate;

(c) The bequest of \$15,000.00 to Sam T. Thorne in Item IV (c) (i) of the Will shall be paid instead to Lenoir Rhyne College upon the death of the last to survive of William D. Lyerly and Myrtice C. Lochmann.”

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The agreement provided that all obligations thereunder were subject to the condition precedent that the settlement agreement be approved by the court in litigation in which all parties affected by the settlement agreement are parties and are properly represented. The present litigation resulted.

After hearing, at which all parties were represented, judgment was entered in which the court made detailed findings of fact substantially as hereinabove stated and including findings that there exists a bona fide factual and legal controversy as to the validity of the purported holographic codicil and that the proposed settlement is in the best interests of all parties thereto and will prevent dissipation and waste of the estate. In accordance with these findings, the court approved the settlement agreement and directed the Executor to administer the estate in accordance with the Will as modified by the agreement.

From this judgment the Executor and the guardian of the minor appealed.

*Sigmon & Sigmon by Jesse C. Sigmon, Jr., for Lenoir Rhyne College; and Farris & Mallard by Lynwood Mallard for Myrtice C. Lochmann, plaintiff appellees.*

*Helms, Mullis & Johnston by E. Osborne Ayscue, Jr., and Robert B. Cordle for First Union National Bank; and John E. McDonald for Eleanor Galloway Thorne, Guardian Ad Litem, defendant appellants.*

PARKER, Judge.

[1] The sole exception in the record is to the entry of the judgment. "This exception presents the single question whether the facts found by the court are sufficient to support the judgment, or, stated differently, whether the court correctly applied the law to the facts found." *Redwine v. Clodfelter*, 226 N.C. 366, 38 S.E. 2d 203.

[2] The courts have generally looked with favor upon family settlement agreements whereby a will contest is avoided or the settlement and distribution of an estate is promoted. Annotation, 29 A.L.R. 3d 8. Such agreements are said to be "bottomed on a sound public policy which seeks to preserve estates and to promote and encourage family accord," *Fish v. Hanson*, 223 N.C. 143, 25 S.E. 2d 461, and "when fairly made, and when they

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do not prejudice the rights of creditors, are favorites of the law." *Tise v. Hicks*, 191 N.C. 609, 132 S.E. 560. "But such agreements will not be approved if the rights of infants are prejudiced thereby. Neither will the terms of a testamentary trust be modified merely because the beneficiaries thereof dislike its provisions. The modification of the terms of such a trust will be approved only when such modification is deemed necessary in order to preserve the trust." *Rice v. Trust Co.*, 232 N.C. 222, 59 S.E. 2d 803.

In *O'Neil v. O'Neil*, 271 N.C. 106, 155 S.E. 2d 495, a case involving both rights of infants and modification of the dispositive provisions of a testamentary trust, Bobbitt, J. (now C.J.), speaking for our Supreme Court, said:

"The provisions of a will or testamentary trust may be modified by a family settlement agreement only where there exists some exigency or emergency not contemplated by the testator. . . .

\* \* \* \*

The mere fact that a caveat has been filed, standing alone, is not sufficient ground for modification of the dispositive provisions of the will. The outcome of the litigation must be in doubt to such extent that it is advisable for persons affected to accept the proposed modifications rather than run the risk of the more serious consequences that would result from an adverse verdict."

[3, 4] Tested by the foregoing principles, the trial court was clearly correct in approving the settlement agreement with which we are here concerned. A bona fide controversy existed as to whether the holographic document being offered for probate was a valid codicil to the will of the testatrix. Counsel equally learned in the law could well differ as to whether it was found among the "valuable papers and effects" of the testatrix or under such other circumstances as to make it a valid holographic will under G.S. 31-3.4. On its face the possibility is suggested that its execution may have been procured by misrepresentation or undue influence, and the outcome of a jury verdict on the issue of *devisavit vel non* would have clearly been in doubt. The only thing which could have been certain to result from continued efforts to probate in the face of a caveat would have been substantial expense to the estate, protracted

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State v. Ford

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delay in its settlement, and complete disruption of family harmony. Under these circumstances all parties were well and prudently advised by their counsel to seek an agreement. The agreement finally arrived at by arms-length negotiations was fair to all concerned. Rights of creditors and of beneficiaries of the estate not parties to the agreement were in nowise affected. The best interests of the minor beneficiary were well served. By the settlement agreement she gave up the right to receive the principal of the \$10,000.00 bequest, but she retained the income therefrom until she becomes twenty-one years of age or until her earlier death. Otherwise her ultimate share in the estate was reduced only by \$1,525.32 (being one-third of the sum of \$4,575.95 paid from the residuary estate to Myrtice C. Lochmann under the agreement.) Had these relatively minor concessions not been made and no settlement agreement been reached, the entire and very substantial interests of the infant in the estate would have been jeopardized. All parties to the settlement agreement other than the infant were *sui juris*, and they were, as was the infant and her guardian, well represented by competent counsel. In arriving at the agreement all parties and their counsel are to be commended.

The judgment approving the agreement is

Affirmed.

Judges BRITT and MORRIS concur.

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STATE OF NORTH CAROLINA v. DONNIE L. FORD,  
ALIAS RONALD FORD

No. 7121SC764

(Filed 15 December 1971)

**Criminal Law § 25—appeal from plea of *nolo contendere***

No error appears on the face of the record proper in this appeal from judgment imposed upon defendant's plea of *nolo contendere* to a charge of felonious escape.

Judge GRAHAM concurring in result.

Chief Judge MALLARD dissenting.

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State v. Ford

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APPEAL by defendant from *Falls, Judge*, 9 August 1971 Session of Superior Court held in FORSYTH County.

The defendant, Donnie L. Ford, alias Ronald Ford, was charged in a bill of indictment, proper in form, with felonious escape, a second offense, in violation of G.S. 148-45(a).

When the defendant was called to plead to the bill of indictment, the record reveals the following:

“MR. TODD: May it please the Court, I should like to offer or tender a plea of nolo contendere, and I would like to explain the circumstances. This defendant doesn't feel that he wilfully did this. There are circumstances, extenuating circumstances, and I'd like the Court to hear it. But I would tender a plea of nolo contendere and let the Court hear these circumstances.

THE COURT: Have you explained to him the effect of a plea of nolo contendere?

MR. TODD: I did.

BY THE COURT TO THE DEFENDANT:

Q. Do you understand it?

A. Yes sir.

Q. Do you understand what a plea of nolo contendere is?

A. Yes sir.

Q. And that's your plea, is it?

A. Yes sir.

Q. I can't hear you.

A. Yes sir.

Q. Answer so the record will show what you are saying.

A. Yes sir.

Q. Has anybody promised you anything in exchange for this plea of nolo contendere?

A. No, they haven't.

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State v. Ford

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Q. Do you now freely, voluntarily, and understandingly enter on your behalf the plea of *nolo contendere*?

A. Yes, I do."

After hearing evidence offered by the State and the defendant, the court entered judgment imposing a prison sentence of two years. The defendant appealed.

*Attorney General Robert Morgan and Deputy Attorney General Andrew A. Vanore, Jr., for the State.*

*Curtiss Todd for defendant appellant.*

HEDRICK, Judge.

The record contains no exceptions or assignments of error. It affirmatively appears from the record that the defendant, represented by counsel, freely, understandingly and voluntarily entered a plea of *nolo contendere* to a valid bill of indictment, and the prison sentence imposed by the judgment is within the limits prescribed for a violation of the statute.

In the defendant's trial in the superior court, we find no error.

No error.

Judge GRAHAM concurs in the result.

Chief Judge MALLARD dissents.

Judge GRAHAM, concurring in result.

The record contains no exceptions or assignments of error. Defendant does not attack his plea of *nolo contendere*, nor does he contend that the record fails to adequately show that the plea was voluntarily and understandingly made. Therefore, I do not think we are required, on our own motion, to inquire into the question of whether the plea was in fact voluntarily and understandingly made, or whether the record sufficiently shows that it was.

Where an appeal contains no assignment of error, the judgment will be sustained unless error appears on the face of the record proper. *State v. Smith*, 279 N.C. 505, 183 S.E. 2d 649.

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The record proper in a criminal case ordinarily consists of (1) the organization of the court, (2) the charge (information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment. *State v. Tinsley*, 279 N.C. 482, 183 S.E. 2d 669. While the plea and arraignment are parts of the record proper, in my opinion, evidence concerning the circumstances under which the plea was entered is not.

In *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S.Ct. 1709, the Supreme Court of the United States reversed three capital convictions on the ground the record failed to affirmatively disclose that defendant voluntarily and understandingly entered his pleas of guilty. There, as here, defendant did not raise this question in his brief. (Apparently the question was argued on oral argument.) The Supreme Court nevertheless concluded that the matter was properly before it because of an Alabama statute requiring the reviewing court to comb the entire record in capital cases for "any error prejudicial to the appellant, even though not called to our attention in brief of counsel." The instant case is not a capital case and therefore is distinguishable from *Boykin*.

Since *Boykin*, we have held that the failure of the record to affirmatively show that a plea of guilty was voluntarily and understandingly entered entitles a defendant to replead. *State v. Harris*, 10 N.C. App. 553, 180 S.E. 2d 29. However, I do not interpret *Boykin*, or *Harris*, to mean that in a non-capital case, an appellate court must search the record to determine if it sufficiently shows that a plea was voluntarily and understandingly made where the defendant has raised absolutely no question with respect thereto.

In my opinion no error appears on the face of the record proper. I therefore vote to find no error without further inquiry.

Chief Judge MALLARD, dissenting.

Counsel for the defendant in this appeal has brought forward no assignments of error but says in his brief that the following question is raised: "Were any of defendant's constitutional or other legal rights abridged by the trial court?" The Attorney General asserts that he has searched the record and can find no error. The indictment properly charged the crime of felonious escape, and the two-year sentence was within the statutory limits. G.S. 148-45. Nevertheless, the defendant's ap-

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peal does present the question whether error appears on the face of the record proper. *State v. Roberts*, 279 N.C. 500, 183 S.E. 2d 647 (1971); *State v. Moore*, 6 N.C. App. 596, 170 S.E. 2d 568 (1969). In *State v. Tinsley*, 279 N.C. 482, 183 S.E. 2d 669 (1971), it is said:

“ \* \* \* Ordinarily, in criminal cases the record proper consists of (1) the organization of the court, (2) the charge (information, warrant or indictment), (3) the *arraignment and plea*, (4) the verdict, and (5) the judgment.” (Emphasis added.)

See also *State v. Roberts*, *supra*. That which occurs during the arraignment and entry of the plea is a part of the record proper. In my opinion, error does appear on the face of this record proper. At the time of the arraignment and entry of the plea of *nolo contendere*, as shown by this record, neither the trial judge nor anyone else actually informed the defendant of the nature of such plea or of the possible consequences. The trial judge did not make an adjudication that the plea was freely, understandingly and voluntarily made, and in my opinion, sufficient facts (as distinguished from conclusions) do not appear of record upon which such an adjudication could properly be made. See *State v. Harris*, 10 N.C. App. 553, 180 S.E. 2d 29 (1971). Therefore, I dissent from the majority opinion.

Furthermore, I do not think that the fact that the record shows that the defendant's lawyer stated to the judge that he had explained to the defendant the *effect* of a plea of *nolo contendere* is a sufficient showing on the record that the legal effect of the plea was explained to the defendant in such a manner *that he understood the nature of the plea and the possible consequences thereof*. It is my opinion that pursuant to the mandate of *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S.Ct. 1709 (1969), when a defendant enters a plea of *nolo contendere*, the record must show that the *trial judge*, or someone under his direction, informed the defendant of the effect of the plea and the possible consequences thereof. In *Boykin* it is stated:

“What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable *in canvassing the matter with the accused* to make sure he has a full understanding of what the plea connotes and of its consequence. \* \* \* ” (Emphasis added.)

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The meaning of the verb "canvass," used in this connection, is "to examine in detail." Webster's Third New International Dictionary (1968). Neither the trial judge nor anyone else under his direction *canvassed the matter* with the defendant *at the time of the arraignment and plea* to make sure he had a full understanding of what the plea connoted and of its consequence. The judge apparently relied upon the conclusions expressed to him by the defendant and by the defendant's lawyer. It is the duty of the trial judge, before accepting a plea of nolo contendere, at least to inform or cause the defendant to be informed that such plea is equivalent to a plea of guilty insofar as it gives the court the power to punish and that the court may impose judgment thereon as upon a plea of guilty, and this should appear of record. In doing so, the defendant should be informed of the possible consequences of a plea of nolo contendere and that such a plea leaves open for review only the sufficiency of the indictment and that all other defenses are waived. *State v. Norman*, 276 N.C. 75, 170 S.E. 2d 923 (1969), *State v. Stokes*, 274 N.C. 409, 163 S.E. 2d 770 (1968). Since the record before us does not show that the judge, or anyone under his direction, explained the nature and possible consequences of a plea of nolo contendere to the defendant, he is entitled to have the plea of nolo contendere stricken and to plead to the bill of indictment. See an annotation in 97 A.L.R. 2d 549 entitled, "Court's duty to advise or admonish accused as to consequences of plea of guilty, or to determine that he is advised thereof."

For the foregoing reasons, I would strike the plea of nolo contendere and remand the case and permit the defendant to plead.

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STATE OF NORTH CAROLINA v. CHARLES JETHRO FRY

No. 715SC529

(Filed 15 December 1971)

**1. Searches and Seizures § 1—seizure of objects in plain sight—lawfulness of seizure**

A police officer may seize and use what he sees in plain sight if he is at a place where he is lawfully entitled to be.

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**2. Searches and Seizures § 1; Criminal Law § 84—seizure of marijuana in plain view of officer—seizure during investigation of traffic offense—validity of seizure**

There was no “search” when a police officer investigating a traffic accident opened the right-side door of a van and saw in plain view a person holding a bag of marijuana in his hand, where (1) the van had been stopped on a city street for repeatedly crossing the center line; (2) the officer had to approach the van from the rear in order to determine who the driver was; (3) the right-side window was covered by a piece of cardboard, which justified the officer in opening the door. Consequently, it was lawful for the officer to seize the marijuana, and it was proper to admit the marijuana in evidence on the trial for unlawful possession of marijuana.

**3. Searches and Seizures § 1; Criminal Law § 84—seizure of marijuana in plain view—failure to make arrest**

Failure of an officer to actually arrest the defendant for a traffic violation committed in the officer's presence did not render inadmissible the marijuana which the officer saw in plain view in the hands of a passenger in the defendant's vehicle.

**4. Searches and Seizures § 1; Criminal Law § 84—seizure of marijuana in plain view—admissibility of officer's testimony**

An officer who lawfully seized marijuana found in plain view during his investigation of a traffic offense could properly testify as to the circumstances surrounding the seizure, notwithstanding the officer failed to make an arrest at the time of the seizure.

**5. Narcotics § 4—possession of marijuana—sufficiency of evidence**

Evidence of the defendant's guilt of possessing more than one gram of marijuana was properly submitted to the jury.

**6. Criminal Law § 170—remarks of the court—harmless error**

Trial court's statement to the jury that motions for directed verdicts of not guilty had been entered by all four defendants and had been granted only as to two defendants, one of whom was about to testify for the other defendants, *held* not an expression of opinion in violation of G.S. 1-180.

**APPEAL** by defendant from *Blount, Judge*, 18 January 1971 Session of NEW HANOVER Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the felony of having in his possession on 24 November 1970 more than one gram of marihuana. The case was consolidated for trial with those of three other defendants: McCrary, Caton and Pry. At the close of the State's evidence, the court directed a verdict of not guilty as to the co-defendants Caton and Pry; and at the close of all the evidence, the defendant McCrary withdrew his plea of not guilty and en-

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tered a plea of guilty as charged. Mick Leroy Watson (Watson) pleaded guilty to the possession of marihuana on the occasion in question and was used by the State as a witness.

The evidence for the State tended to show the following: Late in the afternoon of 24 November 1970, the defendant, Charles Fry, co-defendant McCrary, and State's witness Watson left Fry's home at Kure Beach and drove in Fry's van-type vehicle to the vicinity of the Ethyl Dow Road where they parked. They remained parked there approximately 30 to 45 minutes, and all three of them were smoking marihuana. Defendants Fry and McCrary had marihuana in their possession at the time. They then drove to a club at Carolina Beach called the "Landmark." They remained at this establishment for a while, then left around 11:00 p.m., taking with them Sue Carol Caton and Marvin Pry. Fry was driving his van down Oleander Drive, and the van was crossing back and forth over the center line of the road. Two officers of the Sheriff's Department of New Hanover County followed the vehicle for over a half mile before stopping it to check the driver's operator's license. When the van stopped (after the officers turned on their blue light and siren), the defendant Fry got out and ran back to the officers' vehicle before they could get out. Before Fry got out of the van, he had given Watson two plastic bags, each of which contained over one gram of marihuana and had told him to get rid of them. Watson lifted the engine cowl or hood, which opened on the inside of the vehicle, and dropped the two plastic bags given to him by Fry through the engine compartment to the ground. While Fry was out of the van talking to Deputy Sheriff Davis at the sheriff's vehicle, the other officer, Officer Howell, approached the van from the rear; and when he arrived at the window on the right side, he found that the window was covered with cardboard. Thereupon, Officer Howell opened the door and saw Watson with another plastic bag (which had been given to him by McCrary). He then observed Watson drop the third bag into the engine compartment, but this bag did not fall to the ground because it was trapped against the radiator by the fan. Officer Howell thereupon opened the cowl, picked the plastic bag from the engine compartment and saw that it contained a substance which he thought was marihuana and which later was found to contain marihuana. He directed Watson, McCrary, Caton and Pry to get out of the vehicle while he crawled under it and retrieved the other two bags which he had

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seen, by using his flashlight, lying on the ground when he had opened the engine cowl from the inside. Each of the three bags was found to contain more than four grams of marihuana, and together, they contained a total of 19.6 grams. After Officer Howell had picked up the other two plastic bags from the ground, all five of the occupants of the van were arrested on the charge of possessing marihuana. The defendant Fry was not arrested for driving a vehicle recklessly; nor was he arrested for driving a motor vehicle back and forth across the center line. The officers did not have a search warrant for the vehicle.

The defendant offered evidence by the witness Marvin Dean Pry that he (Pry) did not see the defendant McCrary pass a package to anyone. Pry also stated that he was seated, at one time, on the engine cowl on top of the motor, that Watson was sitting on the right by the door, and that he (Pry) was between Watson and McCrary. Defendant offered evidence by the testimony of Mrs. R. E. McCrary that Watson told her that the defendant McCrary was just a passenger in the vehicle, did not know anything about the marihuana and was innocent. Defendant's witness T. J. Fry testified that he is the father of the defendant Fry and that Watson had told him that the defendant Fry "had nothing to do with it and did not know one thing about it." The defendant Fry did not himself go upon the witness stand and testify.

The jury returned a verdict of guilty as charged as to the defendant Fry, and from a judgment of imprisonment for three years, the defendant appealed to the Court of Appeals, assigning error.

*Attorney General Morgan and Assistant Attorney General Richmond for the State.*

*A. A. Canoutas for defendant appellant.*

MALLARD, Chief Judge.

Defendant contends that the trial judge committed error in failing to suppress the testimony of Officer Howell of the New Hanover County Sheriff's Department and in subsequently allowing the three bags of marihuana to be introduced into evidence.

Officer Howell was testifying and was asked the question: "What did you see when you opened the door?" Defendant ob-

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jected. No ruling on this objection was made by the judge, and the witness did not at that time answer the question. However, the judge sent the jury out; and after extensive questioning of the witness Howell, the defendant moved, in the absence of the jury, that the evidence and testimony of Howell be suppressed. This motion was denied and the defendants excepted. After the jury returned, the witness Howell did not answer the specific question that had been propounded to him previously but did testify in response to questions, without objection, as to what he did and what he saw after he had opened the door of the van. There was no objection to his testimony that he saw Watson with the bag (later determined to contain marihuana) in his hand and as to what Watson did with it. He also testified, without objection, to finding the two bags, later determined to contain marihuana, on the ground. Watson had testified that Fry had given him the two bags which he (Watson) dropped on the ground, and that McCrary had given him the one bag which was stuck in the motor. The three bags were identified by the witness without objection; however, the defendant did object to the introduction of the three bags into evidence.

We do not think that the question of the admissibility of the testimony of the witness Howell as to what he saw when he opened the door of the van is properly presented on this record. Moreover, his testimony tended to corroborate that of the State's witness Watson and was competent for that purpose. *State v. Dixon*, 8 N.C. App. 37, 173 S.E. 2d 540 (1970); *State v. Culbertson*, 6 N.C. App. 327, 170 S.E. 2d 125 (1969); 7 Strong, N. C. Index 2d, Witnesses, § 5. "Objections to evidence *en masse* will not ordinarily be sustained if any part is competent." *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963). See also 7 Strong, N. C. Index 2d, Trial, § 15.

Ordinarily, objections to the admission of testimony or other evidence must be made at the time of its introduction. An objection to the admission of evidence is necessary to properly present a defendant's contention on appeal that the evidence was incompetent. 3 Strong, N. C. Index 2d, Criminal Law, § 162. However, in view of the holdings in the cases of *State v. McMilliam*, 243 N.C. 771, 92 S.E. 2d 202 (1956), and *State v. McMilliam*, 243 N.C. 775, 92 S.E. 2d 205 (1956), and due to the fact that defendant's counsel may have been acting under the misapprehension that no further objections were necessary to

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present for review the question of competency of what Officer Howell saw when he opened the door of the van, we will consider the question.

[1, 2] A search ordinarily involves prying into hidden places, and a seizure contemplates forcible dispossession. However, a police officer may seize and use what he sees in plain sight if he is at a place where he is lawfully entitled to be. *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963). See also an annotation in 26 L. Ed. 2d 893, entitled "Validity, Under Federal Constitution, of Warrantless Search of Automobile—Supreme Court Cases" and also *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969), and the cases cited therein. In the case before us, we hold that there was no "search"; the officer seized only that which was in plain view, and no search was required. The two bags of marihuana lying on the ground and picked up by the officer were not obtained by a search, nor was the bag he saw in Watson's hand.

From the testimony of Officer Howell, he had probable cause to arrest the operator of the defendant's van for reckless driving or driving across the center line and on the wrong side of the road. It was the duty of the officer to investigate a violation of the law occurring in his presence. It was at night. The driver could not be seen or identified from the rear of the vehicle. Under the circumstances, the officers were not required to run the risk of colliding with the vehicle while passing it in an attempt to identify the operator.

When the defendant Fry stopped the van and ran back to the officers' vehicle before the officers could get out, we think that Officer Howell, in investigating the incident, had probable cause to approach the van to determine if defendant Fry was alone in the van (and therefore the operator) and that when he could not observe whether there were any other occupants of the vehicle due to the cardboard in the right side window, he had a right to open the door. This action did not constitute a search of the vehicle. The officer was not required to go around to the other side or to try to look through the windshield. The officer was on one of the public streets in New Hanover County at a place where it was his duty to be and was investigating a violation of the traffic laws that had been committed in his presence. It is not a "search" when a police officer, investigating a violation of the traffic laws, opens the door of the vehicle in-

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volved when necessary to see the occupants thereof. In this case it was not an unlawful intrusion, and the officer was justified in opening the door of the van—it did not constitute an “unreasonable search.”

“What the ‘plain view’ cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.” *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971). See also *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971), and *State v. Jordan*, 277 N.C. 341, 177 S.E. 2d 289 (1970).

[3] During this investigation, the officer inadvertently found evidence, in plain view, of the commission of a felony. An arrest for the commission of a felony was made. We hold that the failure of the officer to actually arrest the defendant (which he probably should have done) for the traffic violation did not render inadmissible the evidence of possession of marihuana which was in plain view while the officer was investigating, before arrest, a crime that he had probable cause to believe had been committed in his presence.

An arresting officer has the authority to seize and hold articles which he sees the accused trying to hide. *Abel v. United States*, 362 U.S. 217, 4 L. Ed. 2d 668, 80 S. Ct. 683 (1960), *re-hearing denied*, 362 U.S. 984, 4 L. Ed. 2d 1019, 80 S. Ct. 1056. We hold that under the circumstances of the case, Officer Howell was an arresting officer and therefore had the authority to seize and hold the bag of marihuana which he saw the State’s witness Watson attempting to hide.

[4] Assuming that the admissibility of the officer’s testimony is properly presented, we hold that the trial court did not commit error in failing to suppress the testimony of the witness Howell. In view of the testimony of the witness Watson, as well as the witness Howell, the trial judge did not commit error in admitting into evidence the three bags containing the marihuana.

[5] The defendant also contends that the trial judge committed error in failing to allow his motion for a directed verdict at the close of the evidence. This contention is without merit. There was plenary evidence to support the defendant’s conviction of the crime charged.

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[6] The defendant also contends that the trial judge committed error when the jury was informed that motions for directed verdicts of not guilty had been entered by all of the defendants and had been granted only as to the defendants Sue Carol Caton and Marvin Pry. The defendants had made their motions in open court in the presence of the jury and after the State had rested. The motions were denied as to the defendants McCrary and Fry. The defendants then proceeded to offer Marvin Dean Pry (who had been a defendant) as a witness, whereupon the court instructed the jury in the following language with respect to the status of the case at that time:

“Ladies and gentlemen, motions have been made on the part of the defendants for directed verdicts of not guilty as to all of the defendants and motions have been granted as to the defendants Sue Carol Caton and the defendant Marvin Pry.”

Under these circumstances, we do not think that this was an expression of an opinion by the judge, in violation of G.S. 1-180, or that the trial judge committed prejudicial error in thus informing the jury.

In the trial we find no error.

No error.

Judges HEDRICK and GRAHAM concur.

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STATE OF NORTH CAROLINA v. GEORGE LAFAYETTE SMITH

No. 7112SC745

(Filed 15 December 1971)

1. Narcotics § 4— possession of heroin — sufficiency of evidence

The State's evidence was sufficient for the jury in this prosecution for unlawful possession of heroin where it tended to show that a police officer saw three tinfoil packages drop from the side of defendant as defendant emerged from an automobile, and that the packages contained heroin.

2. Constitutional Law § 33— privilege against self-incrimination

The privilege against self-incrimination can be claimed only by the witness, and when it is claimed, it is guaranteed by the Fifth Amendment to the Constitution of the United States, as well as by Art. I, § 23, of the Constitution of North Carolina.

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**3. Constitutional Law § 33—possible self-incrimination—testimony insufficient in itself to subject witness to prosecution**

In a prosecution for unlawful possession of heroin, the trial court did not err in permitting defendant's witness, who was under indictment for transportation of the heroin defendant was accused of possessing, to refuse to answer on the ground of his privilege of self-incrimination questions asked by defense counsel relating to whether the witness was with defendant in an automobile on the date of defendant's arrest and what occurred and what the witness observed while he was in the automobile and when defendant was arrested, since the witness' answers may tend to incriminate him even though they would not in themselves subject him to a criminal prosecution.

**4. Narcotics § 3—impounding of witness' automobile—irrelevancy**

In this prosecution for unlawful possession of heroin, defendant was not prejudiced by the trial court's ruling that the answer of defendant's witness to a question as to whether his automobile was impounded subsequent to his arrest with defendant would not be put in the record because it could have no connection with the guilt or innocence of defendant.

APPEAL by defendant from *Braswell, Judge*, 19 July 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the felony of unlawfully possessing a quantity of the narcotic drug heroin.

The evidence for the State tended to show, except where quoted, that William J. Bentley, a police officer of the City of Fayetteville attached to the Inter-Agency Bureau of Narcotics, was on duty during the early morning hours of 5 March 1971, that he saw a 1969 two-door Lincoln Continental in front of 2502 Slater Avenue, and that the defendant and two companions got in it and drove off. Bentley followed the vehicle to where it stopped in front of a house located at 306 Davis Street. He stopped the vehicle he was operating about twenty feet behind and left his headlights shining on the vehicle in front, got out, and walked up to the Lincoln. As Bentley approached, the driver, Elwood Newman, who had emerged from the left side of the vehicle, said something to the officer and looked toward the opposite side of the car where the defendant was getting out of the car from the rear seat. Officer Bentley testified:

“\* \* \* When I seen him get out of the car, I noticed two or three was in the car at that time. I saw some shiny objects, which I observed was tinfoil, going more or less

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down the side of his leg. I then went across in front of the car, ran in front of the car, to the right side, retrieved three tinfoil packages; and at this time a female got out and ran in the rear of 306 Davis Street. It was three to eight seconds from the time I saw what appeared to be tinfoil packages dropping from the side of the defendant until the time I got around to the other side of the car. I saw this tinfoil, three small tinfoil packages, laying on the ground around where Lafayette Smith was.

\* \* \* The other persons in the car were doing nothing to my knowledge when the matter was dropped down the defendant's leg. I saw no other items come out of any of the windows in the car. \* \* \*

\* \* \*

At the time I saw the items drop, I had the bright lights on my car on this car and also the door of the Lincoln Continental was open and, therefore, the inside light from there was on. \* \* \*

\* \* \*

I had had several occasions to meet Lafayette Smith. The defendant's house is located at 2502 Slater Avenue, the original place I saw the defendant in the automobile."

Each of the three tinfoil packages contained the narcotic drug heroin.

The evidence for the defendant tended to show that Elwood Newman did own a 1969 Lincoln Continental. Newman testified on cross-examination that at the time of the trial of this defendant, he was under indictment for the transportation of "those three packages of heroin on the fifth day of March." Miss Gail P. Lay, defendant's witness, testified that on this occasion she was in the front seat of the two-door automobile with Newman. Defendant Smith and a Miss Glendale Pickney were seated in the rear. They stopped in front of Pickney's home on Davis Street, and defendant got out of the car on the driver's side while Pickney was getting out on the right or passenger's side. The witness Lay testified that she did not see the defendant drop any objects wrapped in tinfoil. Pickney testified that she did not see the defendant Smith "in possession of any objects wrapped in tinfoil from the time Elwood Newman came to Lafayette Smith's house until the time that he was placed in the police car." The

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defendant testified that he did not have any heroin in his possession. All of the occupants of the car were arrested and charged with the possession of heroin. Lay and Pickney testified that they too had no heroin in their possession on this occasion.

The jury returned a verdict of guilty as charged. From a judgment imposing a prison sentence, the defendant appealed to the Court of Appeals.

*Attorney General Morgan and Assistant Attorney General Hudson for the State.*

*Anderson, Nimocks & Broadfoot by Stephen Nimocks for defendant appellant.*

MALLARD, Chief Judge.

[1] Defendant contends that the trial judge committed error in failing to allow his motions for judgment of nonsuit made at the close of the evidence for the State and again at the close of all the evidence. We hold that there was ample evidence to require submission of the case to the jury.

[3] The defendant also contends that the trial judge committed error in failing to require the defendant's witness, Elwood Newman, to answer the following questions propounded to him by the defendant's attorney, in the absence of the jury, after the witness had refused to answer the question, "Were you in an automobile at this particular time?" on the grounds "that it might tend to incriminate" him:

"And ask Mr. Newman, if the defendant Lafayette Smith, was in an automobile with him on the fifth day of March 1971?

\* \* \*

Mr. Newman, if you did take LaFayette Smith up on the fifth day of March, where did you then proceed?

\* \* \*

Did you stop your automobile at the location of 307 Davis Street on this particular day in question?

\* \* \*

Did you, Mr. Newman, at any time see the defendant,

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Lafayette Smith, have in his possession any object wrapped in tinfoil?

\* \* \*

Where was the defendant Lafayette Smith, when he was a passenger in the car described by the State's witness, where was he seated in the automobile?

\* \* \*

Did you have a conversation with Mr. Bentley, on the day of March 5th, in the close proximity of the automobile?

\* \* \*

Did you ever see Officer Bentley go from the left side of the Lincoln automobile, around the front of the Lincoln automobile, to the right hand side of the automobile?

\* \* \*

Did you ever see Office Bentley pick up any objects, wrapped in tinfoil, from the close proximity of the automobile or the close proximity of Lafayette Smith?

\* \* \*

Did Officer Bentley ever tell you where he found the objects that were wrapped in tinfoil?

\* \* \*

Did you, Mr. Newman, hold a flashlight, at the request of Mr. Bentley, on him, hold a flashlight upon the person of Lafayette Smith, while Officer Bentley searched the person of Lafayette Smith?

\* \* \*

When were you charged with the possession of these same narcotics?

\* \* \*

Will you describe the windows and doors of the 1969 Lincoln Continental that you owned on March 5th, 1971?"

The witness Newman testified that he was under indictment for the transportation, on the same date, of the same three packages of heroin that the defendant was charged with possessing. Newman's lawyer was present in the courtroom, and from time to time during his interrogation by defendant's counsel, Newman was permitted to consult with his lawyer before responding to questions. To each of the foregoing questions, Newman

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replied that he refused to answer on the grounds that the answer might tend to incriminate him. The judge declined to require that he answer them and defendant excepted. The defendant also excepted to the following typical findings of the trial judge in holding that the witness Newman would not be required to answer the questions:

“At this juncture, having heard all of the State’s evidence and having heard that the evidence tends to show that Elwood Newman was the driver of the automobile which did go to the residence of this defendant, picked him up, drove him to the Davis Street residence, 206, and that the evidence tends to show that they were in there in each others company at all times of the hours in question, that there they were in the same vehicle for (sic) which the defendant alighted and from whose body State Exhibit Number 1, containing heroin was seen falling in front of his body or by his feet, and that the court believes that the answers to questions that would logically follow would have a tendency to incriminate him, and therefore he has claimed the privilege of refusing to answer and the Court rules that he will not be required to answer.

\* \* \*

I hold, in view of the evidence which is of record here, that it would be a violation of his constitutional rights to require him to answer and, therefore, he will not be required to answer, for the record or in the presence of the jury.”

In *Hoffman v. U. S.*, 341 U.S. 479, 95 L. Ed. 1118, 71 S. Ct. 814 (1951), in discussing the privileges against self-incrimination granted by the Fifth Amendment to the United States Constitution, the Court said:

“\* \* \* This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure. *Counselman v. Hitchcock*, 142 U.S. 547, 562, 35 L. Ed. 1110, 1113, 12 S. Ct. 195 (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72, 73, 65 L. Ed. 138, 141, 142, 41 S. Ct. 26 (1920).

The privilege afforded not only extends to answers that would in themselves support a conviction under a federal

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criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. \* \* \* The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers v. United States*, 340 U.S. 367, *ante*, 344, 71 S. Ct. 438, 19 ALR 2d 378 (1951), and to require him to answer if 'it clearly appears to the court that he is mistaken.' *Temple v. Commonwealth*, 75 Va. 892, 899 (1881). However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.' See Taft, J., in *Ex parte Irvine*, 74 F 954, 960 (CC SD Ohio 1896)."

[2] The privilege against self-incrimination can be claimed only by the witness, and when it is claimed, it is guaranteed by the Fifth Amendment to the Constitution of the United States, as well as by Art. 1, § 23 of the Constitution of North Carolina. See *State v. Morgan*, 133 N.C. 743, 45 S.E. 1033 (1903).

In *Emspack v. United States*, 349 U.S. 190, 99 L. Ed. 997, 75 S. Ct. 687 (1955), the Court said:

"\* \* \* The protection of the Self-Incrimination Clause is not limited to admissions that 'would subject [a witness] to criminal prosecution'; for this Court has repeatedly held that 'Whether such admissions by themselves would support a conviction under a criminal statute is immaterial' and that the privilege also extends to admissions that may only tend to incriminate. \* \* \*"

In *Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964), it is said:

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"It is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to incriminate him or subject him to fines, penalties or forfeitures. \* \* \* The rule against self-incrimination has existed from an early date in the English common law, and its origin has been said to be based on no statute and no judicial decision but on a general and silent acquiescence of the courts in a popular demand. \* \* \*

The constitutional guaranties against self-incrimination should be liberally construed. *Gouled v. United States*, 255 U.S. 298, 65 L. Ed. 647; *Quinn v. United States*, 349 U.S. 155, 99 L. Ed. 964; *Ullmann v. United States*, 350 U.S. 422, 100 L. Ed. 511, 53 A.L.R. 2d 1008; 98 C.J.S., Witnesses, sec. 432.

The privilege against self-incrimination may be exercised by a witness in any proceeding. \* \* \*

[3] We hold that on this record, Elwood Newman (offered as a witness by the defendant), in good faith and in a proper manner, claimed the privilege against self-incrimination and that the answers to the questions propounded, in the setting in which they were asked, were ones of possible self-incrimination and fall within the scope of the privilege. The able and experienced trial judge so found and properly held that the witness should not be required to answer the questions propounded. *Smith v. Smith*, 116 N.C. 386, 21 S.E. 196 (1895); *LaFontaine v. Southern Underwriters*, 83 N.C. 133 (1880); *State v. Huffstetler*, 1 N.C. App. 405, 161 S.E. 2d 617 (1968); 8 Wigmore, Evidence, §§ 2268, 2271; 98 C.J.S., Witnesses, §§ 435, 436, 437.

[4] Defendant also contends that the trial judge committed error in holding that the answer of the defendant's witness Newman to a question as to whether his automobile was impounded subsequent to his arrest on 5 March 1971, would not be put in the record because it could have no connection with the guilt or innocence of the defendant. This question was asked and the ruling was made in the absence of the jury. Even if it were error to fail to permit the answer of the witness to appear of record for the assigned reason, it does not appear how it could be prejudicial to the defendant. See *Highway Commission v. Pearce*, 261 N.C. 760, 136 S.E. 2d 71 (1964).

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We have examined each of the defendant's other assignments of error relating to the admission and exclusion of testimony and find no error prejudicial to the defendant.

In the trial we find no error.

No error.

Judges HEDRICK and GRAHAM concur.

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**STATE OF NORTH CAROLINA v. JAMES BRYAN WATSON**

No. 7112SC657

(Filed 15 December 1971)

**1. Constitutional Law § 30— speedy trial**

The right to a speedy trial is relative and guards against arbitrary and oppressive delays due to the fault of the prosecuting authorities.

**2. Constitutional Law § 30— speedy trial—delay between warrant and trial**

Defendant was not denied his right to a speedy trial by a delay of 21 months between the issuance and execution of a warrant charging him with murder and his trial on that charge, where defendant was out on bail for most of that time, the trial was delayed on two occasions when defendant asked for continuances, and the record does not show that defendant was prejudiced by the delay.

**3. Homicide § 21— first degree murder — sufficiency of evidence**

The State's evidence was sufficient for the jury in this prosecution for first degree murder where it tended to show that defendant had bumped into deceased while in a lounge and that deceased told defendant, "I will see you later," that defendant left the lounge and then returned, walked over to deceased, slapped him and stabbed him with a knife, that defendant had blood on his shirt when arrested a short time after the crime, that a knife with fresh bloodstains on it was found in defendant's jail cell after his arrest and defendant stated that he hid the knife in his shoe, that defendant stated while in custody that "If he is dead, I killed him," and that deceased died from hemorrhage and asphyxia as a consequence of the stab wound.

**4. Jury § 5— competency of juror — discretion of court**

The question of the competency of a juror is ordinarily one for the trial judge to determine in his discretion, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law.

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**5. Jury § 5— juror who was solicitor's father-in-law**

The trial court did not err in the denial of defendant's challenge for cause of a prospective juror who was the father-in-law of the solicitor for the district, where the prosecution was handled by an assistant solicitor and the solicitor took no part in the trial, and the trial judge conducted a voir dire and determined to his satisfaction that the juror would not find the defendant guilty simply because the juror was the solicitor's father-in-law.

**6. Criminal Law § 80; Death § 1; Evidence § 28— certified copy of death certificate**

In this homicide prosecution, a certified copy of the victim's death certificate was properly admitted for the purpose of proving the time, place and cause of the death.

**7. Constitutional Law § 29; Criminal Law § 135; Jury § 7— exclusion of jurors opposed to death penalty**

In this first degree murder prosecution, the trial court did not err in the exclusion of prospective jurors who stated they could never return a verdict requiring the death penalty; furthermore, defendant was not prejudiced thereby where he was convicted of the non-capital crime of second degree murder.

**APPEAL** by defendant from *Cooper, Judge*, 19 April 1971 Session of CUMBERLAND Superior Court.

By indictment proper in form, defendant was charged with the first degree murder of Billy Gene Horner. The jury returned a verdict of guilty of murder in the second degree and from judgment imposing prison sentence of not less than 25 nor more than 30 years, defendant appealed.

*Attorney General Robert Morgan and Assistant Attorney General James E. Magner, Jr., for the State.*

*Downing, David and Vallery by Edward J. David for defendant appellant.*

**BRITT, Judge.**

Defendant assigns as error the denial of his motion for dismissal of the prosecution for failure of the State to bring him to a speedy trial. The record reveals the following sequence of pertinent events: The alleged offense occurred on 19 July 1969 and warrant was issued and executed on that date. On affidavit of defendant's indigency, E. J. David was appointed as legal counsel for defendant evidently on 21 July 1969. On 30 July 1969, a district court judge found probable cause and defendant was bound over to superior court without privilege of bond. On

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12 August 1969, on motion of defendant's attorney, Judge Bickett entered an order committing defendant to State Hospital for 60 days for a determination of defendant's sanity and his mental ability to plead to the charges against him. At the 22 September 1969 Session of the court a true bill of indictment was returned charging defendant with first degree murder. On 2 October 1969 (obviously after defendant was returned from State Hospital to the Cumberland County Jail), Judge Bickett entered an order that defendant be transferred to Central Prison in Raleigh to be detained pending further order of the court. On or about 1 November 1969 defendant filed petition for habeas corpus asking that he be released from State Prison and given a speedy trial. On 12 December 1969 defendant was allowed bail and from that date until the date of his trial was free on bail except for a brief interval when his bondsman "went off his bond." On 15 December 1969 Judge Bickett entered an order denying the petition for habeas corpus. Defendant made no motion for a trial after he was allowed bail and on two occasions his attorney moved for and was granted postponements of the trial. When the case was called for trial at the 19 April 1971 Session, defendant through his counsel moved for a further continuance but this motion was denied.

[1, 2] Defendant fails to show how any delay was prejudicial to him. The witnesses that were not present at the trial had not been subpoenaed to appear. The right to a speedy trial is not designed as a sword for a defendant's escape, but a shield for his protection. *State v. Patton*, 260 N.C. 359, 132 S.E. 2d 891 (1963). "No general principle fixes the exact time within which a trial must be had. Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case. In the absence of a statutory standard, what is a fair and reasonable time is within the discretion of the court." *State v. Lowry*, 263 N.C. 536, 542, 139 S.E. 2d 870, 875 (1965). The right to a speedy trial is relative and guards against arbitrary and oppressive delays due to the fault of the prosecuting authorities. *State v. Lowry, supra*. Such is not the case here. The possibility of unavoidable delay is inherent in every criminal action. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969). In this case no prejudice to defendant is shown and the record reveals that defendant himself was responsible for the delay on two occasions by asking for continuances. Under the

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facts of this case, we hold that there was no denial of a speedy trial.

[3] Defendant assigns as error the failure of the court to grant his timely made motions for nonsuit. A review of pertinent testimony most favorable to the State is summarized as follows:

On 19 July 1969 at about 4:15 p.m. Horner, the deceased, and Shelton David Tew were standing and drinking beer at a bar in Gib's Lounge in the City of Fayetteville. Defendant, an acquaintance of Horner and Tew, entered the front door of the lounge, "bumped into" Horner, then went on to the other end of the bar. Some five minutes later Horner, Tew and Jesse Pittman sat down at a booth in the lounge with the intention of playing checkers. As Horner walked from the bar to the booth he passed close to defendant and told him, "I will see you later." In the booth Horner and Tew were sitting on one side of the table with Horner on the inside and Pittman was sitting on the other side of the table. About the time Horner, Tew and Pittman sat down at the booth, defendant left the lounge. Some five minutes later defendant returned to the lounge, walked directly to the booth where Horner was sitting, leaned across the table in front of Tew and said to Horner, "So you will see me later, will you?" Defendant then slapped Horner twice after which Horner, still sitting, "backed up" and raised his hands which had nothing in them. Defendant then stuck a knife in the left side of Horner's neck near the bottom of his ear, the blade of the knife being some four inches long and "pretty wide." Defendant then withdrew the knife from Horner's neck, walked away from the booth and stood around in the lounge. On being cut, Horner began bleeding profusely. He got up from the booth and rapidly becoming weaker, propped himself against a pool table in the lounge. Tew helped Horner out of the lounge and down the street some 75 or 100 feet from the lounge where Horner propped himself against a car. Tew telephoned for an ambulance and when he returned to Horner he had slipped down on the street where he continued to bleed profusely from the wound, his nose and mouth. An ambulance arrived shortly thereafter and carried Horner away. Horner died a little later that day, the immediate cause of death being hemorrhage and asphyxia due to or as a consequence of stab wound of the left neck.

Very shortly after Horner left in the ambulance, police officers arrested defendant at the Fayetteville home of defend-

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ant's parents. He had blood on his shirt at that time. While in custody defendant made the statement, "If he (Horner) is dead, I killed him." Horner was not armed at the time of the stabbing. A knife with fresh blood stains on it was found in defendant's jail cell after he was arrested and defendant stated that he hid the knife in his shoe.

Considering the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference which may legitimately be drawn therefrom, with contradictions, conflicts and inconsistencies being resolved in the State's favor, the evidence was more than sufficient to survive the motions for nonsuit. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Jerman*, 9 N.C. App. 697, 177 S.E. 2d 327 (1970). In fact, the evidence would have supported a verdict of first degree murder. The assignment of error is overruled.

[4] Defendant assigns as error the failure of the court to allow his challenge for cause of the solicitor's father-in-law as a juror. The question of competency of a juror is ordinarily one for the trial judge to determine in his discretion. G.S. 9-14. "(H)is rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law." *State v. Spencer*, 239 N.C. 604, 610, 80 S.E. 2d 670, 674 (1954). See also *State v. Degraffenreid*, 224 N.C. 517, 31 S.E. 2d 523 (1944); *State v. Blount*, 4 N.C. App. 561, 167 S.E. 2d 444 (1969).

[5] Our Supreme Court has held that the relationship between a juror and a witness within the ninth degree, standing alone, is not legal ground for challenge for cause. *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969). In this case the relationship is between a juror and the solicitor; however, the record shows that the solicitor took no part in the trial of the case, the prosecution being handled by a member of the solicitor's staff. The judge properly conducted a voir dire and determined to his satisfaction that the juror would not find the defendant guilty simply because the solicitor who was not prosecuting was the juror's son-in-law. This decision in the absence of showing of abuse of discretion is not reviewable upon appeal.

[6] Defendant's next assignment of error relates to the admission into evidence of portions of a certified copy of Horner's death certificate and overruling the defendant's objection to

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it on the grounds of denial of confrontation of witnesses and that the certificate stated opinion and not facts.

It is the duty of appellant to see that the record is properly made up and transmitted. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Evans*, 8 N.C. App. 469, 174 S.E. 2d 680 (1970). The record does not contain the death certificate or show that part of the certificate which the court read to the jury. We assume it was the part that is summarized in the court's charge to the jury as follows: "The State further offered evidence in the form of an authenticated copy of a record of the Office of Vital Statistics of the State of North Carolina, State Board of Health, which in substance tends to show that Billy Gene Horner died in Cumberland County on July 19, 1969, and that the immediate cause of death was hemorrhage and asphyxia due to or as a consequence of stab wound of the left neck."

G.S. 130-66 provides in pertinent part as follows:

"(a) The State Registrar shall, upon request, issue to any authorized applicant a certified copy of the record of any birth or death registered under provisions of this article. Such certified copy of the birth record shall show the date of registration, and such other items as may be determined by the State Registrar.

"(b) The State Registrar is authorized to prepare typewritten, photographic, or other reproductions of original records and files in his office. Such reproductions, when certified by him, shall be considered for all purposes the same as the original and shall be prima facie evidence of the facts therein stated."

G.S. 130-66 supersedes the statute formally codified as G.S. 130-73 which contained a proviso as follows: "Any copy of the record of a birth or death, properly certified by the State Registrar, shall be prima facie evidence in all courts and places of the facts therein stated." In interpreting certain provisions of G.S. 130-73, and particularly the proviso just quoted, the Supreme Court in *Branch v. Dempsey*, 265 N.C. 733, 748, 145 S.E. 2d 395, 406 (1965), opinion by Lake, Justice, said: "The purpose of the statute appears to be to permit the death certificate to be introduced as evidence of the fact of death, the time and place where it occurred, the identity of the deceased, the bodily

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injury or disease which was the cause of death, the disposition of the body and possibly other matters relating to the death." We hold that the portions of the certified copy of the death certificate introduced in evidence in this case were competent for the purposes for which they were admitted and the assignment of error relating thereto is overruled.

[7] Defendant's last assignment of error relates to the allowance of challenges for cause of jurors who did not believe in capital punishment. Under authority of *State v. Miller*, 276 N.C. 681, 174 S.E. 2d 481 (1970), this assignment of error is overruled. Furthermore, defendant fails to show how he was prejudiced by the jurors so challenged since he was not convicted of a capital crime.

Upon a careful review of the entire record, we find

No error.

Judges BROCK and VAUGHN concur.

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STATE OF NORTH CAROLINA v. THOMAS WILLIAM RICH

No. 713SC632

(Filed 15 December 1971)

1. Constitutional Law § 31— daily transcript during the trial

An indigent defendant in a homicide case was not entitled to a daily transcript of the testimony during the trial.

2. Criminal Law § 43— defendant's use of photographs during cross-examination

Refusal of the trial court to allow defendant the use of photographs during his cross-examination of the State's witnesses was without error, especially since the photographs had never been introduced into evidence.

3. Homicide § 26— additional instruction on second-degree murder — omission of words "deadly weapon"

Additional instruction of the trial court which omitted the words "deadly weapon" from the definition of second-degree murder was not prejudicial to defendant, especially since the court had correctly defined the offense in the original instructions.

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**4. Criminal Law § 168— instructions favorable to defendant — review on appeal**

The defendant cannot complain of instructions favorable to him.

APPEAL by defendant from *Hubbard, Judge*, 29 March 1971 Criminal Session of Superior Court, CARTERET County.

Defendant was tried on a bill of indictment, proper in form, charging that on 17 October 1970, he did feloniously, wilfully and of his malice aforethought kill and murder with force and arms Thomas Sidney Lea, Jr. Defendant entered a plea of not guilty. Evidence in the light most favorable to the State tends to show that the deceased and a companion, Clyde Wilson, went to the Elks Club in Morehead City at about 9:30 p.m. on 16 October 1970. They spent some time there drinking.

When they left the club they were met outside by Edward Herring and the defendant, Thomas Rich, who asked for a ride. The deceased and Clyde Wilson had not seen Edward Herring or the defendant, Thomas Rich, prior to this time. When they left the club, the deceased was driving the Volkswagen bus, Clyde Wilson was in the right front seat, the defendant was in the left back seat behind the deceased, and Edward Herring was in the right back seat behind Clyde Wilson.

After they had ridden some distance, the deceased stopped the vehicle, told his passengers that he would go no further, and told them to get out. Defendant said "You are not going to get me all the way down here and make me walk all the way back home." Clyde Wilson got out on the passenger side to open the sliding back door for the defendant and Herring. After Clyde Wilson had exited the vehicle, the deceased yelled from inside "They're fighting me in here." Clyde Wilson saw the defendant have his hand up near the chest of the deceased and when defendant pulled his hand away, he saw the blade of a knife. When Clyde Wilson opened the sliding back door, the defendant and Herring jumped out and ran past Wilson. Clyde Wilson got back in the front seat and the deceased drove off rapidly causing the sliding back door on the passenger side to close by itself. The deceased drove several blocks before stopping and slumping over the wheel.

The State's medical evidence tends to show that the deceased was treated for stab wounds at the hospital; that his lungs

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collapsed; and that he bled to death as a result of a stab wound to his chest, lungs and thoracic arteries. The State's evidence also tends to show that when defendant was taken into custody, he was wearing the same clothes that he had on at the time of the stabbing; that the clothing had red stains on them which were identified as Type A blood; and that the blood found on defendant's clothing was found to be of a different type than defendant's own blood which was Type B.

The defendant offered no evidence. The defendant's motion for dismissal of the first-degree murder charge was allowed but a motion for nonsuit as to all charges was denied. Charges of murder in the second degree and manslaughter were submitted to the jury, and a verdict of guilty to murder in the second degree was returned. From a judgment sentencing defendant to 25-30 years in prison, defendant appealed.

*Attorney General Morgan by Assistant Attorney General Rosser for the State.*

*Nelson W. Taylor and Dennis M. Marquardt for defendant appellant.*

MORRIS, Judge.

[1] Following the impaneling of the jury but prior to the presentation of any evidence, the defendant moved that a daily transcript of the testimony be had "because of the gravity of the case." The court in denying this motion said, "I think the motion comes too late and should have been given time to get another reporter." The defendant assigns as error the denial of this motion. Citing *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S.Ct. 595 (1956), and *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S.Ct. 814 (1963), as authority, defendant contends that the denial of a motion for a daily transcript was a violation of his constitutional rights under the due process and equal protection clauses of the Fourteenth Amendment. *Griffin* held that indigent defendants convicted of criminal charges in Illinois state courts were entitled to a copy of the trial transcript at State expense since they could not otherwise perfect their appeals. *Douglas* held that indigent defendants were entitled to court-appointed counsel to assist in perfecting their appeals to the state courts. The record in this case does not reveal the financial condition of the defendant at the time of his trial, but assuming that defendant was an indigent, we

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believe the trial court properly denied his motion for a daily transcript.

In *Griffin* and *Douglas* the United States Supreme Court determined that a transcript and counsel were absolutely *necessary* for the defendants to exercise their right of appeal under existing appellate practice, and that the defendants were effectively denied that right solely because of indigency. In his concurring opinion in *Griffin*, Justice Frankfurter said:

“Of course a State need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within the reach of a poor man’s purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion.”, at p. 23.

Justice Douglas in *Douglas v. California*, *supra*, also recognized that “Absolute equality is not required; lines can be and are drawn and we often sustain them.” In North Carolina an indigent appellant is entitled to receive a copy of the trial transcript at State expense in order to perfect an appeal. G.S. 7A-450, et seq.; *State v. Roux*, 263 N.C. 149, 139 S.E. 2d 189 (1964). Viewing the record in this case, there is no showing that defendant was deprived of an opportunity to obtain adequate and effective appellate review. See *State v. Allen*, 4 N.C. App. 612, 167 S.E. 2d 505 (1969). Here there has been no deprivation of a substantial constitutional right but merely a dilatory effort on defendant’s part to obtain daily transcripts for his own convenience and without any showing of necessity. Defendant has shown nothing to support his contention that he was entitled, as a matter of right, to a daily transcript, and his exception is overruled.

[2] The defendant also assigns as error the refusal of the court to allow the use of photographs on cross-examination of witnesses for the State to illustrate their testimony when said photographs were never introduced into evidence. Photographs must be introduced *in evidence* before they may be used to illustrate testimony. Stansbury, N.C. Evidence 2d, § 34, p. 69. See also 3 Strong, N.C. Index 2d, Evidence, § 25, p. 637; 3 Wigmore, Evidence 3d, § 790. None of the photographs in this case was offered or introduced into evidence and none is included in the record. Defendant cites *Blackwell v. Lee* and *Tart v. Lee*, 248

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N.C. 354, 103 S.E. 2d 703 (1958), as supporting his contention that he has a "right" to use photographs not admitted in evidence and that the denial of this right is prejudicial error requiring a new trial. As we construe *Blackwell, supra*, it merely said that there was no prejudicial error in the use of photographs not admitted in evidence on cross-examination, but no "right" was established to use photographs not admitted into evidence. Even if defendant could have introduced the photographs in evidence during presentation of the State's case, their admissibility and use are in the discretion of the court, and we find no abuse of discretion here. 2 Strong, N.C. Index 2d, Criminal Law, § 43, *Smith v. Dean*, 2 N.C. App. 553, 163 S.E. 2d 551 (1968). Defendant's assignment of error is overruled.

[3] In his charge to the jury, the court properly instructed them that they could render one of three verdicts; i.e., murder in the second degree, manslaughter or not guilty. The court also correctly defined second-degree murder in his charge as the unlawful killing of a human being with malice. In further charging the jury, the court said:

"The State must prove beyond a reasonable doubt that the defendant, Rich, *intentionally cut or stabbed the deceased, Mr. Lea, with a knife, a deadly weapon*, and that Mr. Lea's death was a natural and probable result of Mr. Rich's act. If the State has satisfied you of those facts beyond a reasonable doubt that the *killing was unlawful and was done with malice, which nothing else appearing, constitutes murder in the second degree*. Even if the State proves, otherwise proves the facts as to murder, the crime may be reduced to manslaughter, if the defendant's act was done without malice. However, the defendant has the burden of proving not beyond a reasonable doubt but to your satisfaction, the absence of malice." (Emphasis added.)

And the court further instructed:

"If you find from the evidence and beyond a reasonable doubt that on or about the 17th day of October 1970 of last year the defendant, Rich, *intentionally stabbed the deceased Sidney Lea with a deadly weapon, a knife*, and that Mr. Lea's death was a natural and probable result of Mr. Rich's act, then it would be your duty to return a verdict of guilty of murder in the second degree, unless the defend-

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ant has satisfied you that he stabbed or killed the deceased in the heat of sudden passion which was produced by acts of the deceased, Mr. Lea, which had a natural tendency to produce such passion in the defendant and that this passion continued to exist until he killed the deceased, in which case it would be your duty to return a verdict of guilty of manslaughter." (Emphasis added.)

The jury retired but later returned to request that the court give additional instructions as to the three charges. In granting their request, the court charged:

"COURT: I charged you that you could bring in one of three verdicts.

JUROR: Right.

(COURT: Murder in the second degree, manslaughter or not guilty. Murder in the second degree is the unlawful killing of a human being with malice, but without the elements of premeditation and deliberation. Where it is shown beyond a reasonable doubt that there was an *intentional killing, malice is presumed.*) (Defendant's Exception No. 35)." (Emphasis added.)

[3, 4] From this portion of the charge defendant excepts and assigns as error the omission of the words "deadly weapon." The defendant contends that malice may not be presumed unless the killing was done with a deadly weapon. Our Supreme Court has said "Malice exists as a matter of law 'whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance.' (Citation omitted.)" *State v. Moore*, 275 N.C. 198, 206, 166 S.E. 2d 652, 657 (1969); see also 4 Strong, N.C. Index 2d, Homicide, § 5, p. 197. In any event, the charge in this case when read contextually is not confusing or misleading and is not prejudicial. The court's charge was not prejudicial to the defendant in omitting the words "deadly weapon" when all the evidence establishes that the deceased was killed by defendant with a deadly weapon and the only question arising is whether the act was intentional or accidental. *State v. Franklin*, 229 N.C. 336, 49 S.E. 2d 621 (1948). The court correctly charged the jury on the presumption of malice prior to giving the instruction which defendant now challenges on appeal. The confusion of giving conflicting instructions was

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not prejudicial error since the definition complained of placed upon the State the added burden of proving a specific intent to kill. The defendant cannot complain of instructions favorable to him. *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423 (1971).

The defendant's other assignments of error have been carefully examined and considered and are overruled.

**Affirmed.**

Judges CAMPBELL and PARKER concur.

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CLIFTON ALEXANDER DILDY v. SOUTHEASTERN FIRE  
INSURANCE COMPANY

No. 711SC623

(Filed 15 December 1971)

**1. Rules of Civil Procedure § 19— joinder of necessary party**

Summary judgment is not a proper remedy for failure to join a necessary party. G.S. 1A-1, Rule 12.

**2. Insurance § 6— construction of insurance policy — strict construction against insurer**

Since policies of insurance are prepared by the insurer, they are liberally construed in favor of the insured and strictly construed against the insurer.

**3. Insurance §§ 69, 105— automobile liability policy — joinder provision — applicability to nonresident uninsured motorist**

The provision of an automobile liability policy which required the insured, in an action against the insurer, to join as a party defendant the person or organization allegedly responsible for the damage to the insured, is held void as against public policy in those cases where the party defendant is a nonresident uninsured motorist and not amenable to the jurisdiction of this State, since there exists the possibility that the insured might have to bring his action in a State in which the insurer is unlicensed and not amenable to process. G.S. 58-31.

**4. Insurance § 6— construction of policies — effect of statutes**

Statutory provisions in effect at the time of the issuance of a policy become a part thereof, and policy provisions in conflict with the statute are void.

APPEAL by plaintiff from *Peel*, Judge, 17 May 1971 Session of GATES Superior Court.

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This action was instituted by plaintiff to recover \$25,000 for personal injuries sustained in an automobile collision in Virginia with two residents of that state who allegedly were uninsured motorists. Defendant is plaintiff's insurance carrier whose policy issued to plaintiff included a clause providing uninsured motorists coverage.

The policy also provided : " . . . (T)he liability of the company shall be determined only in an action against the company. In any action against the company, except in an action to determine whether an automobile is an uninsured automobile, the company may require the insured to join such person or organization (the person or organization allegedly causing or responsible for the injury or damage) as a party defendant."

Defendant filed answer in which is demanded that the two uninsured motorists be joined as parties defendant; defendant also alleged no negligence on the part of the uninsureds and contributory negligence on the part of plaintiff. When plaintiff after about eleven months failed to make the uninsured motorists parties, defendant moved for summary judgment under G.S. 1A-1, Rule 56 on the ground that there is no genuine issue as to any material fact and that defendant is entitled to such judgment as a matter of law. With the motion defendant's counsel submitted an affidavit which stated that both uninsured motorists reside in Virginia, the site of the collision, and that defendant is amenable to service of process there. The trial court granted summary judgment for defendant from which plaintiff appealed.

*LeRoy, Wells, Shaw, Hornthal & Riley by L. P. Hornthal, Jr., for defendant appellee.*

*Jones, Jones & Jones and L. Bennett Gram, Jr., for plaintiff appellant.*

BRITT, Judge.

[1] We hold that the trial court erred in granting summary judgment in favor of defendant. Assuming, arguendo, that defendant was entitled to joinder, it would appear that a motion to dismiss for failure to join a necessary party would be proper, particularly if the dismissal is without prejudice or is with leave to amend or is with leave to make additional parties. See:

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*Plemmons v. Cutshall*, 230 N.C. 595, 55 S.E. 2d 74 (1949); G.S. 1A-1, Rule 12; *Capital Fire Ins. Co. of California v. Langhorne*, 146 F. 2d 237 (8th Cir. 1945); *Keene v. Hale Halsell Co.*, 118 F. 2d 332 (5th Cir. 1941); and *Charne v. Essex Chair Co., et al.*, 92 F. Supp. 164 (1950). However, summary judgment is not a proper remedy for failure to join a necessary party.

We think the basic legal question involved in this appeal—the legality of the joinder proviso of the policy quoted above—dictates that we consider more than the question of procedure presented.

[2] Since policies of insurance are prepared by the insurer, they are liberally construed in favor of the insured, and strictly construed against the insurer. *White v. Mote*, 270 N.C. 544, 155 S.E. 2d 75 (1967). "Uninsured motorists coverage 'is designed to further close the gaps inherent in motor vehicle financial responsibility and compulsory insurance legislation.' 7 Am. Jur. 2d, Automobile Insurance § 135, p. 460. It 'is intended, within fixed limits, to provide financial recompense to innocent persons who receive injuries, and the dependents of those who are killed, through the wrongful conduct of motorists who, because they are uninsured and not financially responsible, cannot be made to respond in damages.' Annotation: 79 A.L.R. 2d 1252, 1252-53." *Buck v. Guaranty Co.*, 265 N.C. 285, 288, 144 S.E. 2d 34, 36 (1965).

In *Buck*, the court also said: "Well-established legal principles include the following: (1) The 'primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and carry such intention into effect to the fullest degree.' 50 Am. Jur., Statutes § 223. (2) 'An insurance contract or policy should be liberally construed to accomplish the purpose or object for which it is made.' 44 C.J.S., Insurance § 297(a)."

[3] At times pertinent to this appeal, G.S. 20-279.21(b) (3) as stated in Sec. 1, Ch. 640 of the 1961 Session Laws provided in relevant part as follows:

"No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in limits for

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bodily injury or death set forth in Subsection (c) of paragraph 20-279.5, under provisions filed with and approved by the Insurance Commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom."

It appears from the quoted statute that the General Assembly clearly intended that automobile liability insurance policies delivered or issued for delivery in this State and covering motor vehicles registered or principally garaged in this State will provide protection, within certain limits, to insureds who are legally entitled to recover damages for bodily injury from owners or operators of uninsured motor vehicles. It is noted that the statute does not restrict the coverage to injury or damage occurring in this State.

[4] It is settled law that statutory provisions in effect at the time of the issuance of a policy become a part thereof, and policy provisions in conflict with the statute are void. *Wright v. Casualty Co.*, 270 N.C. 577, 155 S.E. 2d 100 (1967). G.S. 58-31 states in part that "(n)o company or order, domestic or foreign, authorized to do business in this State under this chapter, may make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit or action thereon may be brought, . . . ."

[3] In the case at bar, the joinder provision in the policy issued by defendant to plaintiff has the practical effect of depriving the North Carolina courts of jurisdiction and making Virginia the proper forum. Needless to say, it would be an exercise in futility for the Superior Court of Gates County to enter an order making the persons allegedly causing plaintiff's injuries parties to the action when they could not be effectively served with process. The record indicates that defendant is authorized to do business in Virginia and if plaintiff filed his action in that state, service of process could be obtained on all parties. Conceding this to be true, how would defendant's policyholders enforce their uninsured motorists coverage on accidents occurring in states in which defendant is not authorized to do business and where defendant is not amenable to legal process?

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Thus the question presented to this court is: Does the joinder proviso in the policy requiring in this instance joinder of uninsured motorists who are non-residents over whom the State has no personal jurisdiction negate the legislative intent in regard to closing gaps in motor vehicle financial responsibility and violate G.S. 58-31 by conditioning jurisdiction?

This is a question of first impression in North Carolina. The precedent in this jurisdiction which most nearly addresses itself to this subject is *Wright v. Casualty Co.*, *supra*, in which the court declared void the provision of an uninsured motorist clause stipulating that upon failure of insurer and insured, or insured's legal representative, to agree as to the right of recovery, the matter should be settled by arbitration, for the reason that the proviso, in effect, ousts the jurisdiction of the courts and conflicts with the beneficent purposes of the uninsured motorist statute.

At least one other jurisdiction, however, has addressed itself directly to the question presented. In *Lawrence v. Continental Insurance Company*, 199 So. 2d 398 (La. App. 1967), the court held that a provision in a family automobile liability policy, issued in state of insured's residence, that insurer could require its insured making claim under uninsured motorist coverage to join uninsured motorist as party defendant was void where uninsured motorist was nonresident of state and state had no personal jurisdiction over him and accident occurred in another state. The clause was deemed void for violation of LSA-R.S. 22:—629 which pertinently provides:

“A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement: . . .

“(2) Depriving the courts of this state of the jurisdiction of action against the insurer; . . .

“B. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.”

While the result in Louisiana was predicated on the rather precise language in the state's uninsured motorist statute, (North Carolina having a similar statute in G.S. 58-31) the

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same result would seem equally justifiable in a jurisdiction without a comparable statutory pronouncement. To hold otherwise would allow the insurer to defeat the policy coverage or substantially hamper its enforcement by compelling the claimant to resort to a distant and possibly inaccessible forum." A. Widiss, *A Guide to Uninsured Motorist Coverage*, § 7.17, p. 273 (1969).

In the case at bar, the effect of the proviso under consideration is to compel plaintiff to seek a forum in another state, which would be burdensome and unjustified. If the uninsured motorists were residents of a state in which defendant was not licensed to do business or amenable to its process, defendant's policyholders could be completely deprived of their uninsured motorist's coverage. Consequently, we hold that the provision, as it relates to uninsured motorists who are non-residents of this State and not amenable to the process of its courts, is void as being repugnant to G.S. 58-31 and negating the expressed intent of the legislature in providing motor vehicle financial responsibility for the residents of this State.

The judgment appealed from is

Reversed.

Judges BROCK and VAUGHN concur.

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WILMAR, INCORPORATED v. LEO VANDER LILES AND WILMAR,  
INCORPORATED v. O. T. POLK, JR.

No. 7126SC620

(Filed 15 December 1971)

1. Contracts § 7; Master and Servant § 11— covenant not to compete— consideration

When the employment preexists the execution of an employment contract containing a covenant not to compete, there must be some additional consideration to the employee to support his covenant not to compete.

2. Contracts § 7; Master and Servant § 11— covenant not to compete— illusory consideration — main purpose of contract

Where employment contracts containing a covenant not to compete were executed by defendant salesmen after they had been employed by plaintiff as salesmen for some time, and the stated con-

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sideration for the contracts was the initiation of a profit sharing plan for defendants and other employees, but the profit sharing plan was subject to amendment by plaintiff and was amended to reduce, and for a period of two years eliminate, contributions by plaintiff to the plan, employees forfeited their interest in the plan if they competed with plaintiff within three years after termination of their employment, and the greatest benefit under the plan accrued to plaintiff's president and sole stockholder, it was *held* that the covenants not to compete were void, the consideration to defendants being illusory, and the covenants being the main purpose of the contract and not ancillary to the contract of employment.

APPEAL by defendants from *Snepp, Judge*, 3 May 1971 Session of MECKLENBURG Superior Court.

Plaintiff instituted these two actions against defendants, former employees of plaintiff, to enforce covenants not to compete contained in employment contracts entered into between plaintiff and defendants. By agreement the cases were consolidated for hearing in the superior court and for determination in this court.

The facts pertinent to the issue raised on appeal are substantially free from dispute.

Defendants were both employed by plaintiff as salesmen of its products, janitorial and automotive chemicals and supplies. They were paid on a commission basis and were assigned to sell in certain non-exclusive territories in North Carolina and Virginia. Defendant Liles became an employee of plaintiff in 1957, and defendant Polk in April 1963. Neither of defendants was asked to enter into any written agreement with plaintiff at the time they became employees. Both defendants continued to work for plaintiff without written contracts until November of 1963. On 6 November 1963 in the case of Liles, and on 7 November 1963 in the case of Polk, written employment contracts were executed with plaintiff. The contracts were similar except for the territories to be covered by defendants. Each of the contracts contained a covenant by defendants not to compete, either directly or indirectly, with plaintiff during the term of their employment or for a period of one year thereafter. The covenant was limited to the territory in which defendants worked while employed by plaintiff. The stated consideration by plaintiff for the new contracts was the initiation of a profit sharing plan for defendants and other employees to begin as of 1 December 1963. Plaintiff also agreed to reimburse the defendants for one-half of their gasoline bill for any quarter in which

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their gross sales exceeded \$9,000.00; this provision could be terminated by plaintiff at its option. There was no other change in the employment conditions or compensation of defendants.

Plaintiff instituted the profit sharing plan as agreed upon in the contracts. The plan was subject to amendment by plaintiff, but plaintiff could not disturb any contributions already made to the fund. The right to amend was exercised by plaintiff on several occasions. By two of these amendments, plaintiff reduced the minimum amount which it would contribute to the plan. Under these reductions, no contributions were made between 30 November 1967 and 30 April 1969.

Defendants continued to work for plaintiff until 1971. On 12 February 1971 defendant Polk voluntarily terminated his employment with plaintiff and on 15 February 1971 defendant Liles voluntarily terminated his employment with plaintiff.

Upon termination of their employment with plaintiff, defendants accepted positions with Palmetto Chemical Company of Cheraw, South Carolina. Palmetto was a direct competitor of plaintiff. Defendants were employed as salesmen by Palmetto and serviced substantially the same territories and customers they had previously serviced for the plaintiff. As a result of their competition, plaintiff suffered a substantial decline in its sales in those areas serviced by defendants. Further pertinent facts are set forth in the opinion.

On 10 March 1971, plaintiff brought these actions seeking to enforce the covenant not to compete contained in defendants' contracts. Pursuant to appropriate notice, plaintiff moved for temporary injunctions against defendants. Following a hearing the superior court made appropriate findings of fact and entered an interlocutory order restraining defendants from further competition with plaintiff.

From this order defendants appealed.

*Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston by Mark R. Bernstein, Sydnor Thompson and W. Samuel Woodard for plaintiff appellee.*

*McElwee & Hall by John E. Hall, and W. G. Mitchell for defendant appellants.*

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BRITT, Judge.

Did the trial court err in entering the temporary injunction appealed from? We hold that it did.

By seeking to have defendants enjoined from certain acts, plaintiff asks the court to exercise its equitable jurisdiction. While under our present system the same court grants legal as well as equitable relief, this does not allow a party the option to demand either at his will; equitable relief will be granted only when legal relief is inadequate, and the party must bring himself within the rule by alleging and establishing facts which will warrant the equitable remedy. McIntosh, N. C. Practice and Procedure, 2d Ed., Sec. 2191.

Although the Supreme Court of North Carolina and this court have considered numerous cases involving anticompetitive covenants, our search fails to reveal any case in which either court addressed itself to a determination of whether the contract before it was, in fact, a naked contract not to compete or an ancillary contract in restraint of trade and whether a restrictive covenant not ancillary to a principal contract of employment, sale, or lease is enforceable.

In 54 Am. Jur. 2d, Monopolies, Sec. 514, p. 961, it is said:

“As a general rule, an anticompetitive covenant is unenforceable unless it is ancillary or incidental to a lawful contract, even though it is supported by a consideration. A restrictive provision which might be upheld if it were incidental to some principal contract cannot be enforced if it appears to be the main purpose of the contract, and not subordinate thereto.”

In *Purchasing Associates, Inc. v. Weitz*, 13 N.Y. 2d 267, 196 N.E. 2d 245 (1963) the New York Court of Appeals said:

“At one time, a covenant not to compete, basically an agreement in restraint of trade, was regarded with high disfavor by the courts and denounced as being ‘against the benefit of the commonwealth’. (Citations) It later became evident, however, that there were situations in which it was not only desirable but essential that such covenants not to compete be enforced.

“Where, for instance, there is a sale of a business, involving as it does the transfer of its goodwill as a going

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concern, the courts will enforce an incidental covenant by the seller not to compete with the buyer after the sale. (Citations) \* \* \* The sole limitation on the enforceability (sic) of such a restrictive covenant is that the restraint imposed be 'reasonable,' that is, not more extensive, in terms of time and space, than is reasonably necessary to the buyer for the protection of his legitimate interest in the enjoyment of the asset bought. (Citations)

"Also enforceable (sic) is a covenant given by an employee that he will not compete with his employer when he quits his employ, and the general limitation of 'reasonableness', to which we have just referred, applies equally to such a covenant. (Citations) However, since in the case of such a covenant the element of good will, or its transfer, is not involved and since there are powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood, the courts have generally displayed a much stricter attitude with respect to covenants of this type. (Citations)"

In *Little Rock T. & L. Sup. Co. v. Independent L. Serv. Co.*, 237 Ark. 877, 377 S.W. 2d 34 (1964) we find:

"A naked contract not to compete with another is against public policy. *Shapard v. Lesser*, 127 Ark. 590, 193 S.W. 262, 3 A.L.R. 247. Such an agreement is permissible, however, either in connection with the sale of a going business or, as here, in connection with a contract of employment. Yet even in those instances the restraint is unreasonable and void if it is greater than is required for the protection of the promisee or if it imposes an undue hardship upon the person who is restricted. Rest., Contracts, § 515, which we quoted with approval in *Marshall v. Irby*, 203 Ark. 795, 158 S.W. 2d 693. Owing to the possibility that a person may be deprived of his livelihood the courts are less disposed to uphold restraints in contracts of employment than to uphold them in contracts of sale. Williston, Contracts (Rev. Ed.), § 1643; Banks, Covenants Not to Compete, 7 Ark. L. Rev. 35."

In *Super Maid Cook-Ware Corporation v. Hamil*, 50 F. (2d) 830 (1931), the 5th Circuit Court of Appeals said:

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"Appellant by its prayer for injunctive relief *prima facie* puts itself in the position of seeking, by contract, to deprive appellees of the right to earn their livelihood. Equity places upon it the burden of showing that the contract was fair, the restrictive covenants reasonable, and that they have a real relation to, and are really necessary for, the protection of appellant in the business to which the covenants are an incident. For, fundamentally, in and of themselves these covenants are in restraint of trade, and unenforceable. It is a settled principle of law that no man may, *per se*, contract with another that that other will not follow a calling by which he may make his livelihood. It is only when they are incidental to some contract which is reasonable in its purpose and its terms, and it is necessary to the protection of the rights of the employer under such contract, that the validity of restrictive covenants will be recognized and enforced, and then only when they are themselves reasonable, no public interests are involved, and the restriction is limited to the very point of the necessity of protecting contract rights, to which the covenant is incidental. In short, it is never the covenant itself, but the covenant in relation to the facts of the situation or contract to which it is incidental, which may be valid.

"Further, it is well settled that, while a court of equity will in proper cases issue its writ of injunction to enforce covenants of this kind, it will not do so unless the whole matter appears equitable; that is, unless it rests upon a contract which is fair in its terms, involves no imposition nor injustice, and the private interests of the employer in the subject-matter of the contract to which the restrictive covenant is incidental, requires in good faith for its protection the enforcement of the covenant. *Hepworth Mfg. Co. v. Ryott* (1920) 1 Ch. 1, 9 A.L.R. 1484; *Samuel Stores v. Abrams*, 9 A.L.R. 1450, note; *Taylor Iron & Steel Co. v. Nichols*, 73 N.J. Eq. 684, 69 A. 186, 24 L.R.A. (N.S.) 933, 133 Am. St. Rep. 753; *Kinney v. Scarbrough Co.*, 138 Ga. 77, 74 S.E. 772, 40 L.R.A. (N.S.) 473; *Herbert Morris, Ltd. v. Saxelby*, 1 App. Cas. 688; *Clark Paper & Mfg. Co. v. Stenacher*, 236 N.Y. 312, 140 N.E. 708, 29 A.L.R. 1325; *Club Aluminum Co. v. Young*, 263 Mass. 223, 160 N.E. 804; *Mentor Co. v. Brock*, 147 Minn. 407, 180 N.W. 553, 20 A.L.R. 857; *Southern Properties v. Carpenter* (Tex. Civ. App.) 21 S.W. (2d) 372, 373."

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The case of *Exterminating Co. v. Jones, et al.*, 258 N.C. 179, 128 S.E. 2d 139 (1962), involved covenants not to compete set forth in original contracts of employment. Our Supreme Court held that courts of equity will enforce such a covenant not to compete if it is: (1) in writing, (2) entered into at the time and as part of the employment contract, (3) based on valuable consideration, (4) reasonable as to time and territory, (5) fair to the parties and (6) not against public policy.

Contracts in restraint of trade or commerce are condemned by statutes in North Carolina. G.S. 75-1 provides in pertinent part as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. . . ." G.S. 75-2 provides: "Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of § 75-1." G.S. 75-4 provides: "No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the State of North Carolina, or at any point in the State of North Carolina, which contract is now illegal or which contract is made illegal by any other section of this chapter." These statutes were enacted by the 1913 General Assembly.

[1] In the case before us the covenants not to compete were included in contracts of employment entered into by the defendants after defendant Liles had been in plaintiff's employment for six years and defendant Polk for six months. When the employment preexists the execution of the contracts, there must be some additional consideration to the employee to support his covenant not to compete. *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E. 2d 166 (1964).

[2] The principles stated above must be applied as we turn to an examination of the facts in this case. As mentioned before, the contracts before us were not entered into at the time defendants were employed by plaintiff. Each contract provided for the initiation of a profit sharing plan allegedly for the bene-

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fit of defendants (and other employees) and for the reimbursement of one-half defendants' gasoline bills for any quarter in which their gross sales exceeded \$9,000. In return defendants executed the covenants not to compete with plaintiff. The terms and conditions of defendants' existing employment were not altered in any other manner. Plaintiff's promise to reimburse defendants for their gasoline bills could be terminated at plaintiff's option and it is not contended that such a promise would be valid consideration to support defendants' covenants. The profit sharing plan instituted pursuant to defendants' contracts provided that plaintiff could, at any time, amend the plan so long as such amendment did not divert the corpus of the trust to a purpose other than for the benefit of members of the plan. Under this provision plaintiff did in fact alter the plan to reduce its contributions to the trust fund. These reductions had the effect of eliminating, for a period of two years, any contributions by plaintiff. Under the plan if an employee under written contract with plaintiff terminated his employment, he would not be entitled to his vested interest until three years from the date of termination. It was further provided that if the former employee competed with plaintiff during this period, he would forfeit his vested interest and it would revert to the accounts of all other participants in the plan in proportion to their share of allocable contributions for that year. It is noted that the forfeiture provision extends two years beyond the period covered by defendants' covenants not to compete. Contribution to an employee's account was based on the ratio of the employee's compensation to the total compensation of all participants in the plan. Other relevant circumstances include the fact that Mr. Jules Buxbaum is the president and sole shareholder of plaintiff corporation. As such he was paid the highest salary of any employee and therefore he was the greatest beneficiary of the profit sharing plan.

An analysis of the profit sharing plan leaves little doubt as to whether it was a consideration for defendants' covenants. The plan was drawn up by plaintiff; it was subject to amendment by plaintiff; it was amended by plaintiff to reduce, and for a period of two years eliminate, contributions to the plan; it imposed a three-year limitation on competition by former employees and the greatest benefit of the plan accrued to plaintiff's president and owner, Jules Buxbaum. We find this consideration to be illusory as to defendants. "A consideration

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cannot be constituted out of something that is given and taken in the same breath— . . . .” *Kadis v. Britt*, 224 N.C. 154, 163, 29 S.E. 2d 543, 548 (1944).

Somewhat analogous to the facts in this case is the following statement by the court in *Super Maid Cook-Ware Corporation v. Hamil*, *supra*: “Without guaranteeing to the defendants one day’s regular work, without the obligation of the appellant to employ them or pay them anything, upon a seductive promise of the disclosure of information upon which they may hope to build a profitable line of sales, the appellees are induced to sign a paper which, while it has the general appearance of a contract, but keeps the promise to the ear while it breaks it to the hope. Such a contract, wanting in mutuality, presenting no equitable considerations, a court of equity will not enforce. (Citations)”

To be enforceable, a covenant not to compete must protect some substantial interest of the employer. We are not convinced from the evidence in this case that defendants had access to any trade secrets. Defendants were already employees of plaintiff at the time the contracts were executed. They had acquired a knowledge of plaintiff’s business methods, customer list and territories prior to the execution of the contracts. The plaintiff had failed to protect his interest at the time the defendants came into his employment. By the contracts plaintiff was merely attempting to close the barn door after the horse was out.

The inescapable conclusion then is that in actuality the restrictive covenant not to compete here sought to be enforced is not an ancillary contract at all. It is the main purpose of the contract and not a subordinate feature. It becomes and is, therefore, a naked contract not to compete not protected as to enforceability by the exceptions afforded ancillary contracts in restraint of trade permissible in connection with the sale of a going business, a contract of employment, or a lease.

For the reasons stated the order appealed from is

Reversed.

Judges MORRIS and PARKER concur.

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Wilmar, Inc. v. Anderson

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WILMAR, INCORPORATED v. HENRY M. ANDERSON, JR.

No. 7126SC621

(Filed 15 December 1971)

APPEAL by defendant from *Fountain, Judge*, 10 May 1971 Session, MECKLENBURG Superior Court.

This is an action seeking to enforce by injunction a covenant not to compete entered into between defendant as employee and plaintiff as employer.

*Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by Mark R. Bernstein, Sydnor Thompson and W. Samuel Woodard, for plaintiff appellee.*

*McElwee and Hall, by John E. Hall, and W. G. Mitchell for defendant appellant.*

MORRIS, Judge.

The questions raised by this appeal are identical to those raised in *Wilmar, Incorporated v. Liles and Wilmar, Incorporated v. Polk*, 13 N.C. App. 71 (1971). The facts vary only in the type of employment defendant had with plaintiff and the type of employment with plaintiff's competitor. This variance in facts is of no significance in the application of the principles of law discussed in *Wilmar, Incorporated v. Liles and Wilmar, Incorporated v. Polk, supra*. The principles are equally applicable here.

For the reasons stated in *Wilmar, Incorporated v. Liles and Wilmar, Incorporated v. Polk*, the judgment of the trial tribunal must be

Reversed.

Judges BRITT and PARKER concur.

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Presson v. Presson

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DONALD CRAVEN PRESSON v. NANCY C. PRESSON

No. 7126DC699

(Filed 15 December 1971)

**1. Divorce and Alimony § 18— alimony pendente lite — dependent spouse — insufficiency of findings**

The trial court's findings that defendant-wife is a "dependent spouse" amounted merely to a conclusion which is not supported by a sufficient finding of fact where the court made factual findings as to the earnings of the parties, but made no findings of fact that the wife is either "substantially dependent" upon the husband for her maintenance and support or that she is "substantially in need of maintenance and support" from the husband. G.S. 50-16.1(3).

**2. Divorce and Alimony § 18— alimony pendente lite — insufficiency of findings**

The trial court erred in awarding alimony pendente lite to the wife where the court made no factual findings or even conclusions (1) that the wife "is entitled to the relief demanded" in the action in which the application for alimony pendente lite was made and (2) that she "has not sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof." G.S. 50-16.3(a) (1), (2).

**3. Divorce and Alimony § 18— award of counsel fees — necessity for proper award of alimony pendente lite**

An award of counsel fees to the wife under G.S. 50-16.4 cannot be sustained where the court's award of alimony pendente lite to the wife has been set aside because not supported by sufficient findings of fact.

**4. Divorce and Alimony §§ 23, 24—child custody and support — insufficiency of findings**

The trial court erred in awarding custody of the minor children of the parties and in directing payments for their support absent appropriate findings based on competent evidence as to what provisions would best promote the welfare of the children and as to what were the reasonable needs of the children for health, education and maintenance.

APPEAL by plaintiff from *Abernathy*, Chief District Judge, 9 August 1971 Session of District Court held in MECKLENBURG County.

Plaintiff-husband filed complaint in this action on 28 June 1971 seeking an absolute divorce on the ground of one year's separation. On 15 July 1971 defendant-wife filed answer and cross-action, alleging that the separation was due to plaintiff's

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**Presson v. Presson**

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misconduct and asking that she be awarded custody of three minor children, possession of the home, permanent and pendente lite support for herself and the children, and counsel fees. On 29 July 1971 the answer and cross-action, together with an order directing plaintiff to appear and show cause why the requested pendente lite relief should not be granted to defendant, were served on the plaintiff. On 11 August 1971 a hearing was held pursuant to the show cause order, at which the court refused to permit plaintiff to introduce evidence as to adultery on the part of defendant-wife, since no reply or affidavit alleging adultery had been filed prior to the hearing. The court heard evidence as to where the children had been residing and as to the earnings of the parties, and entered an order containing the following:

“[T]hat for the purpose of this Order the Court finds as a fact that the Plaintiff has earned for the first six months of 1971, \$5,913.29, that the Defendant is a beauty operator and has earnings of \$100.00 to \$125.00 per week depending on her commissions, that the Plaintiff has a guaranteed salary of \$150.00 per week plus commissions, that the Defendant, for the purpose of this Order and not to be binding on the further hearing, is a dependent spouse; . . .”

On these findings of fact, the court adjudged that “for the purpose of this Order, the Defendant is a dependent spouse as provided by Chapter 50 of the General Statutes of the State of North Carolina,” awarded custody of two of the children to defendant and custody of the third child to plaintiff, ordered that plaintiff continue to have possession of the home, and ordered plaintiff to make payments of alimony, child support, and attorney’s fees pendente lite. The order directed that this matter be “continued for a period of sixty days to permit the Plaintiff to file a reply or other pleadings to allege any defense that he might have as to the Defendant’s cross-action,” and specified that “this Order is a temporary Order only and a full and complete hearing will be had at the end of sixty days hereof and a temporary Order then entered in compliance with the findings of the Court at that time.”

To the entry of this order, plaintiff excepted and appealed.

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Presson v. Presson

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*Hicks & Harris by Richard F. Harris III for plaintiff appellant.*

*Welling & Miller, by Charles M. Welling for defendant appellee.*

PARKER, Judge.

Appellant's assignments of error, challenging the validity of the order appealed from on the ground that the trial court made insufficient findings of fact to support its award of alimony pendente lite and counsel fees and its award of child custody and child support, must be sustained. By statute, G.S. 50-16.8(f) "[w]hen an application is made for alimony pendente lite, the parties shall be heard orally, upon affidavit, verified pleading, or other proof, *and the judge shall find the facts from the evidence so presented.*" (Emphasis added.) "While the precise factual findings which must be made will vary depending upon the pleadings, evidence and circumstances of each case, the trial judge must make sufficient findings of the controverted material facts at issue to show that the award of alimony *pendente lite* is justified and appropriate." *Austin v. Austin*, 12 N.C. App. 286, 295, 183 S.E. 2d 420, 427.

[1] In the case now before us, the trial judge made insufficient findings of fact as to the controverted material facts at issue. While the court found and adjudged that defendant-wife in this case is a "dependent spouse," such a finding under the circumstances of this case amounted to no more than a conclusion which was unsupported by a finding of fact. As pointed out by Mallard, Chief Judge, in *Peoples v. Peoples*, 10 N.C. App. 402, 411, 179 S.E. 2d 138, 143, "[t]o find that one is a 'dependent spouse' within the meaning of G.S. 50-16.1(3) is a consequence of two or more related propositions taken as premises, one being the fact that the relationship of spouse exists, and the other consisting of at least the finding that one of the two alternatives in G.S. 50-16.1(3) is a fact." The two alternatives referred to in the statute are: (1) when one spouse "is actually substantially dependent upon the other spouse for his or her maintenance and support," and (2) when one spouse "is substantially in need of maintenance and support from the other spouse." Here, the trial court made factual findings as to the earnings of the parties, but made no finding of fact that the wife in this case is either "substantially dependent" upon her husband for

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her maintenance and support or that she is "substantially in need of maintenance and support" from her husband. Indeed, the factual findings which the court did make as to the earnings of the parties tend to negate a finding that either alternative exists. Thus, the finding in this case that defendant-wife is a "dependent spouse" amounted merely to a conclusion which is not supported by a sufficient finding of fact.

Even had there been sufficient factual findings to support the court's conclusion in this case that defendant-wife is a "dependent spouse," the court's factual findings would still have been insufficient to support the award of alimony pendente lite under G.S. 50-16.3 or to support the order for counsel fees under G.S. 50-16.4. Under G.S. 50-16.3(a) a dependent spouse who is a party to an action for divorce, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

"(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made; and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

[2, 3] Again as pointed out by Mallard, Chief Judge, writing the opinion of this Court in *Peoples v. Peoples, supra*, "[t]he two quoted sections of G.S. 50-16.3(a) are connected by the word 'and;' it is therefore mandatory that the grounds stated in both of these sections be found to exist before an award of alimony *pendente lite* may be made." In the order appealed from in the present case there are no factual findings or even any conclusions stated with respect to either. As to the grounds stated in the first section of G.S. 50-16.3(a), there should have been sufficient factual findings upon which the legal conclusion may be based that the dependent spouse "is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made." As to the grounds stated in the second section of G.S. 50-16.3(a), there should have been sufficient factual findings to establish "that the dependent spouse has not sufficient means whereon to subsist during the

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prosecution or defense of the suit and to defray the necessary expenses thereof." Here, there was neither. Therefore, the award of alimony pendente lite was not supported by sufficient findings of fact and cannot be sustained. Under G.S. 50-16.4 an order for reasonable counsel fees for the benefit of a dependent spouse may be entered "[a]t any time that a dependent spouse would be entitled to alimony pendente lite pursuant to G.S. 50-16.3"; since the order here appealed from is deficient in findings to establish that defendant is entitled to alimony pendente lite pursuant to G.S. 50-16.3, the award of counsel fees under G.S. 50-16.4 is also unsupported and must be reversed.

[4] Absent appropriate findings based on competent evidence as to what provisions would best promote the welfare of the minor children of the parties and as to what were the reasonable needs of the children for health, education and maintenance, it was also error for the trial court to award custody of the children and to direct the payments for their support. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77; *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324; *In re Moore*, 8 N.C. App. 251, 174 S.E. 2d 135.

The order appealed from is vacated and the cause remanded for further findings and determination.

Error and remanded.

Judges MORRIS and VAUGHN concur.

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CATAWBA VALLEY MACHINERY CO., INC. v. AETNA INSURANCE COMPANY

No. 7125SC516

(Filed 15 December 1971)

1. Insurance § 78— motor cargo insurance — coverage of goods "held in trust" — textile machinery

A provision of a motor cargo insurance policy which covered the land shipment of textile machinery "held in trust" by the insured is held to embrace the insured's hauling by truck of twenty-three hosiery machines owned by a customer who agreed to pay the insured \$8.50 an hour for carrying the machinery from Pennsylvania to North Carolina.

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2. Insurance § 78— motor cargo insurance — construction of the words “held in trust”

The words “held in trust,” when used in a policy of insurance, are not to be taken in their technical sense so as to limit coverage to cases where title to property is vested in a trustee, but are to be considered as inclusive of all property which has been entrusted to the insured.

3. Insurance § 6— construction of insurance contract

The terms of an insurance contract must be given their plain, ordinary, and accepted meaning unless they have acquired a technical meaning in the field of insurance, or unless it is apparent that another meaning was intended.

4. Insurance § 78— motor cargo insurance — transportation of textile machinery — damage to machinery — effect of exclusionary clause

With respect to coverage under a motor cargo insurance policy for damage to a customer's hosiery machinery that was being transported from Pennsylvania to North Carolina by the insured, a hosiery machinery dealer who was not in the contract hauling business, the clause which specifically excluded from coverage all machinery transported by the insured under a hauling contract or as a bailee for hire is held controlling, rather than the clause which insured the shipment of machinery “held in trust” by the insured.

5. Insurance § 6— construction of ambiguous words

Any ambiguity in words selected by an insurance company must be resolved in favor of the insured and against the company.

6. Insurance § 6— construction of comprehensive coverage provision

Comprehensive coverage provisions of an insurance contract must be read together with other provisions which, through exclusions, more definitely define the scope of the coverage provided.

7. Insurance § 78— motor cargo insurance — loss of hosiery machinery in transport — exclusionary provisions

Evidence offered by a hosiery machinery dealer established that it was transporting a customer's hosiery machines under a contract of hauling at the time the machines were damaged in a wreck, and consequently the dealer could not recover for loss of the machines under an insurance policy which specifically excluded goods carried under a contract of hauling.

APPEAL by plaintiff from *Friday, Judge*, January 1971 Session of Superior Court held in CATAWBA County.

This is a civil action to recover \$19,400 allegedly owed by defendant under a policy of insurance issued to plaintiff 18 December 1965.

Plaintiff corporation is a hosiery machinery dealer. Its principal business consists of buying and reselling hosiery mills

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and machinery and selling hosiery machinery on commission and consignment.

The policy sued upon is entitled "Motor Truck Cargo Policy." It provides in paragraph 2:

"2. COVERING. This Policy covers on land shipments of lawful goods consisting principally of TEXTILE MACHINERY the property of the Insured, or *held by them in trust*, or on commission, or on consignment, or on which they have made advances, or sold but not delivered, while loaded for shipment on or in transit in or on the following described vehicles, operated by the Insured but only to cover as respects each vehicle within the specified radius from the Insured's base of operations all within 48 contiguous States of the United States, the District of Columbia and the Provinces of Canada."

Paragraph 7 of the policy provides in bold print "THIS POLICY DOES NOT INSURE. . . ." Then follows thirteen subparagraphs listing various exceptions to coverage, including subparagraph (d) which provides: "Goods carried by the Insured under a contract or agreement of hauling or as bailee for hire. . . ."

On 30 August 1968, during the policy period, plaintiff's truck wrecked causing damage to its cargo, which consisted of twenty-three hosiery machines owned by a customer. The machines were being transported from a plant in Reading, Pennsylvania to a plant of the customer's subsidiary corporation in Hickory. The machines were being hauled pursuant to an agreement whereby plaintiff was to be paid an hourly rate of \$8.50 an hour for driving time and for time spent in loading and unloading the machines.

Defendant refused to pay for the damages to the machines, contending that the machines were not covered under the terms of the policy of insurance. Plaintiff made settlement directly with its customer and instituted this suit to recover the amount paid the customer, plus legal expenses incurred in making settlement.

At the conclusion of plaintiff's evidence defendant moved for a directed verdict asserting as grounds therefor that plaintiff's evidence had conclusively established that the machines in

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question were not covered under the policy of insurance sued upon. The court allowed defendant's motion and plaintiff appealed.

*Kenneth D. Thomas for plaintiff appellant.*

*Patrick, Harper & Dixon by Bailey Patrick and F. Gwyn Harper, Jr., for defendant appellee.*

GRAHAM, Judge.

[1] The first question presented by this appeal is whether, at the time the machines were damaged, they were being held in trust by the insured within the meaning of paragraph 2 of the policy which includes among the property covered, "property of the Insured, or *held by them in trust*. . . ."

[2] We think this question must necessarily be answered in the affirmative. It is universally held that the words "held in trust," when used in a policy of insurance, are not to be taken in their technical sense so as to limit coverage to cases where title to property is vested in a trustee, but are to be considered as inclusive of all property which has been entrusted to the insured. See Annot., 67 A.L.R. 2d 1241, 1245, and cases there cited. "The words 'in trust' may, with entire propriety, be applied to any case of bailment, where goods belonging to one person are intrusted to the custody or care of another, and for which the bailee is responsible to the owner." *Exton & Co. v. Home Fire & Marine Ins. Co.*, 249 N.Y. 258, 164 N.E. 43.

[3] This holding is consistent with general principles prevailing in North Carolina to the effect that "[t]he terms of an insurance contract must be given their plain, ordinary, and accepted meaning unless they have acquired a technical meaning in the field of insurance, or unless it is apparent that another meaning was intended." 4 Strong, N.C. Index 2d, Insurance, § 6 at 462.

Defendant does not seriously question this interpretation, stating in its brief:

"For the purpose of argument we assumed that the words 'in trust' as used in the policy in question are not to be interpreted as meaning only a technical trust in which title to the property is held by the trustee, but are to be

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interpreted in the commercial or mercantile sense as embracing property of others, possession of which has been entrusted to the insured for which the insured may be called to account. The words 'in trust,' when thus interpreted are equivalent to stating that a general bailment exists between the owner and the insurance carrier."

[4, 5] The next question becomes: Were the machines which were "held in trust" by the insured excluded from coverage by the language of paragraph 7(d), which specifically provides that the policy does not insure goods carried by the insured under a contract or agreement of hauling or as a bailee for hire? These words were selected by the insurance company and therefore any ambiguity or uncertainty as to their meaning must be resolved in favor of plaintiff and against the company. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518. However, an insurance contract, like any other contract, is to be construed according to the sense and meaning of its terms, and if the terms used are clear and unambiguous, they are to be taken and understood in their plain, ordinary and popular sense. *Powers v. Insurance Co.*, 186 N.C. 336, 119 S.E. 481.

We find no ambiguity or uncertainty in the language of paragraph 7(d). The language used is simple and all the terms have well understood meanings. The clause simply excludes from coverage goods which, although held by the insured "in trust" for another, are being transported by the insured under a contract or an agreement of hauling or as bailee for hire.

"The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E. 2d 295, 297. Through the exclusion contained in paragraph 7(d), the parties obviously intended to preclude coverage to cargo transported under a "contract of hauling," as contrasted with cargo transported by plaintiff in the course of its customary business of purchasing and selling hosiery machinery. Without such a provision, plaintiff would have received protection under the policy even if it had entered the business of "contract hauling," a business which involves a broader risk than the risks which the policy in question was intended to cover.

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[6] Plaintiff contends that there is an irreconcilable conflict between paragraph 2 and paragraph 7(d) in that the coverage purportedly provided in the former paragraph is totally eliminated by the latter paragraph. If provisions in an insurance contract are conflicting, the provision favorable to the insured should be held controlling. *Felts v. Insurance Co.*, 221 N.C. 148, 19 S.E. 2d 259. However, we do not find an irreconcilable conflict in the provisions of the two paragraphs. Comprehensive coverage provisions of an insurance contract must be read together with other provisions, which through exclusions, more definitely define the scope of the coverage provided. We note that many insurance contracts have exclusion clauses which limit coverage. This is a well accepted and effective manner of specifically defining the actual coverage intended. Of course an exclusion purporting to totally eliminate the coverage defined in a comprehensive statement of coverage would present an irreconcilable conflict. Here, however, paragraph 7(d) does nothing more than limit the protection afforded to that which would ordinarily be needed by a hosiery machinery dealer who is not in the business of hauling for hire. Had plaintiff desired more comprehensive coverage, it was available, although undoubtedly at a higher premium.

[7] The final question is whether plaintiff's evidence conclusively shows that plaintiff was transporting the machines under a contract or an agreement of hauling or as a bailee for hire at the time they were damaged.

Plaintiff offered evidence tending to show that it agreed to transport the machines in question as a favor for its customer, the owner, and not for the purpose of realizing a profit. It contends that the \$8.50 an hour was charged simply to help defray expenses. Plaintiff further argues that the court should have permitted evidence of its total volume of business for the year 1968 for the purpose of showing that transporting the machines in question was only a small part of that total. We do not agree.

The question is whether there was a valid and enforceable contract—not whether it was profitable, or whether it was motivated by a desire on plaintiff's part to incur the favor of a customer. The law does not require the consideration to be in exact proportion to the thing to be done. "The slightest consideration is sufficient to support the most onerous obligation,

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the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.'” *Young v. Highway Commission*, 190 N.C. 52, 57, 128 S.E. 401, 403.

In our opinion, plaintiff’s evidence shows that the machines were being transported under a contract of hauling. “When the plaintiff fails to show coverage under the insuring clause or establishes an exclusion while making out his prima facie case, nonsuit is proper.” *Williams v. Insurance Co.*, 2 N.C. App. 520, 523, 163 S.E. 2d 400, 402. Since plaintiff’s evidence here conclusively establishes an exclusion, the directed verdict entered for defendant was proper.

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

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ALTON WILLIAM OTTINGER v. SIDNEY ANDREW CHRONISTER,  
ROBERT MICHAEL BILES, ROBERT JUNIOR BILES, WOOD-  
WARD SPECIALTY SALES, INC.

No. 7127SC653

(Filed 15 December 1971)

**1. Torts § 7—abolishment of distinction between release and covenant not to sue**

The Uniform Contribution Among Tortfeasors Act (G.S. 1B-4), which abolished the distinction between a release and a covenant not to sue, does not apply to litigation pending on 1 January 1968.

**2. Torts § 2—joint tort-feasors—single cause of action**

For an injury by joint tort-feasors, there is a single cause of action for all damages, and there can be only one recovery and satisfaction.

**3. Torts § 7—covenant not to sue one joint tort-feasor—consent judgment of nonsuit—release barring action against other tort-feasor**

Where plaintiff instituted an action against alleged joint tort-feasors prior to 1 January 1968, plaintiff, for a consideration of \$5,000, thereafter executed a covenant not to sue one tort-feasor which reserved plaintiff’s right to proceed against other tort-feasors, and pursuant thereto a consent judgment was entered in which plaintiff took a voluntary nonsuit with prejudice as to the tort-feasor plaintiff had covenanted not to sue, it was held that the consent judgment extinguished plaintiff’s cause of action and constituted a release barring

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the right to maintain the action against the other tort-feasor, notwithstanding the intent of the parties and the provision attempting to reserve the right of action against other tort-feasors.

APPEAL by plaintiff from *Anglin, Judge*, 17 May 1971 Session, Superior Court of GASTON County.

Plaintiff, Alton William Ottinger, was injured by the alleged concurrent negligence of Sidney Andrew Chronister and Robert Michael Biles. About 9:15 p.m. on 9 July 1966 plaintiff was a passenger in an automobile owned and being operated by Chronister, an employee of Woodward Specialty Sales, Inc. (Woodward). The defendant, Robert Michael Biles, was operating an automobile owned by his father, Robert Junior Biles, when the two cars collided at the intersection of N.C. Highway 49 and Rural Paved Road 1578 in Stanly County near Richfield. On 21 November 1966 the plaintiff instituted this action against Sidney Andrew Chronister, Woodward Specialty Sales, Inc., Robert Michael Biles, and Robert Junior Biles as guardian ad litem for his minor son.

On 27 April 1968 plaintiff executed a document entitled "Covenant Not to Sue", denominated in the notary's certificate as a "release." By the terms of this document plaintiff acknowledged the receipt of \$5,000 and agreed: "to refrain forever from commencing, instituting, procuring, pressing, permitting, continuing, or in any way aiding any claim, suit, action, cause of action or proceeding by or on behalf of myself against Robert Junior Biles or Robert Michael Biles and all persons, firms and corporations which might be liable for the acts of the aforesaid parties, for damages, costs or expenses, including all claims for damages for personal injuries, medical expenses and pain and suffering on account of or arising out of an accident which occurred in Stanly County, North Carolina at or near the intersection of North Carolina Highway 49 and Rural Paved Road 1578 on or about July 9, 1966 involving a motor vehicle owned by Robert Junior Biles and driven by Robert Michael Biles and an automobile driven by Sidney Andrew Chronister in which I was a passenger." The document concluded by "expressly reserving to the undersigned (plaintiff), however, all rights to proceed against Sidney Andrew Chronister, Woodward Specialty Sales, Inc. or any other person, firm or corporation other than the parties aforesaid for all claims, demands, loss and expense and causes of action arising out of the aforesaid accident."

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As a result of that agreement the following order was entered by the Clerk of Gaston Superior Court on 6 May 1968:

"THIS CAUSE coming on to be heard before the undersigned Clerk of Superior Court for Gaston County, North Carolina, and it appearing to the Court that the plaintiff desires to take a voluntary nonsuit as to the defendants Robert Michael Biles and Robert Junior Biles *with prejudice* to the plaintiff's right to pursue his action against them further;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this action as to the defendants Robert Michael Biles and Robert Junior Biles be, and it hereby is, dismissed." (Emphasis added.)

On 24 June 1968, a motion by defendants Chronister and Woodward was allowed permitting them to amend their answers. The answers as amended alleged that the entry of a judgment releasing one joint tort-feasor releases all; that the judgment of nonsuit entered 6 May 1968 constituted a release of defendants Biles; that the release of defendants Biles constituted a plea in bar to recovery from defendants Chronister and Woodward; and that for these reasons, the plaintiff's action against Chronister and Woodward should be dismissed. Plaintiff, by way of reply, admitted that he executed a paper writing entitled "Covenant Not to Sue" for which he was paid \$5,000 and that a judgment of nonsuit was entered 6 May 1968. In his reply, however, plaintiff denied that the judgment of nonsuit constituted a "release" of Robert Michael Biles and Robert Junior Biles.

At a hearing held 20 May 1971, the court made the following conclusions of law, to each of which plaintiff excepted:

"1. That the judgment agreed upon between the plaintiff, his counsel, and counsel for the defendants Biles, dismisses the cause of action and withdraws the same 'with prejudice' to the plaintiff's right to pursue his action against the defendants Biles and that said judgment dismisses the cause of action.

2. That the cause of action is single and indivisible and that said judgment and acceptance of the sum of \$5,000.00 amounts to a relinquishment of plaintiff's claim and right of action against the defendants Biles and releases the

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defendants, Sidney Andrew Chronister and Woodward Specialty Sales, Inc."

Plaintiff appeals the entry of the order allowing the plea in bar and dismissing the action against defendants Chronister and Woodward.

*Childers and Fowler, by Henry L. Fowler, Jr., for plaintiff appellant.*

*Mullen, Holland and Harrell, by James Mullen, and Hollowell, Stott and Hollowell, by Grady B. Stott, for defendant appellees.*

MORRIS, Judge.

The sole question for determination on this appeal is whether the transactions in question constitute in law a release so as to bar the prosecution of the action against the defendants Sidney Andrew Chronister and Woodward Specialty Sales, Inc.

[1] The Uniform Contribution Among Tortfeasors Act (G.S. 1B-4) abolishes the distinction between a release and a covenant not to sue. Unfortunately for the plaintiff in this case, the Act did not become effective until 1 January 1968, and does not apply to litigation pending at that time. This action was instituted 21 November 1966, and was, therefore, "pending litigation" on the effective date of the Act. *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E. 2d 480 (1969). Thus in this case, the distinction between a covenant not to sue and a release is critical.

"Legal principles pertinent to decision on this appeal are summarized by Moore, J., in *McNair v. Goodwin*, 262 N.C. 1, 136 S.E. 2d 218, as follows: 'A valid release of one of several joint tortfeasors releases all and is a bar to a suit against any of them for the same injury. This is true for the reasons that the injured party is entitled to but one satisfaction, the cause of action is indivisible, and the release operates to extinguish the cause of action. (Citations omitted.) But a covenant not to sue does not release and extinguish the cause of action, and the cause of action may be maintained against the remaining tort-feasors notwithstanding the covenant. (Citations omitted.) The remaining tort-feasors are entitled, however, to have the amount paid for the covenant credited on any judgment thereafter ob-

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tained against them by the injured party. (Citations omitted.)' " *Thrift v. Trethewey*, 272 N.C. 692, 695, 158 S.E. 2d 777, 779 (1968).

The facts of the present case appear to be indistinguishable from the case of *Simpson v. Plyler*, 258 N.C. 390, 128 S.E. 2d 843 (1963), wherein the above legal principles were applied. In *Simpson*, the plaintiff executed a document purporting to be a covenant not to sue administratrix but reserving the right to sue the corporate defendant. Thereafter, pursuant to said covenant, a consent judgment was entered terminating plaintiff's cause of action against the administratrix upon payment of \$3500. A document labeled "Satisfaction of Judgment" purported to reserve plaintiff's cause of action against the corporate defendant. The corporate defendant's amended answer alleged, however, that the transaction was a "release." A jury found the transaction to be a covenant not to sue, but the court set the verdict aside. At a new trial, the court found that the agreement, judgment and satisfaction of judgment constituted a release and dismissed plaintiff's action against the corporate defendant. On appeal to the North Carolina Supreme Court, the judgment dismissing plaintiff's cause of action was affirmed.

"If it appears from the instrument that covenantor has discharged his cause of action against the covenantee, a joint tort-feasor, it is not a matter for construction, all joint tort-feasors are released. (Citations omitted.) The crucial question, in determining whether an instrument is a release or a covenant not to sue, is whether the cause of action has been extinguished. The cause of action is single, indivisible and non-apportionable. Once it is extinguished it has no further vitality. A holding otherwise would abolish the release rule altogether and ignore the basis upon which the rule rests." *Simpson v. Plyler*, *supra*, at p. 395.

[2, 3] In the present case, the clear intent of the plaintiff was to reserve his cause of action against Chronister and Woodward. Nevertheless, the Court said in *Simpson* that:

"The recitals of the parties are not controlling. (Citations omitted.) Where the language of the instrument is so comprehensive and inclusive that it amounts to a relinquishment of the injured person's claim and right of action against a joint tort-feasor, or where the instrument ex-

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pressly provides that it shall be a defense and bar to the former's cause of action against the latter, all of the joint tort-feasors are released. This is true even if the instrument purports to save and reserve the cause of action against the other wrongdoers." *Simpson v. Plyler, supra*, at pp. 394, 395.

For an injury by joint tort-feasors, there is a single cause of action for all damages, and there may be only one recovery and satisfaction. *Ramsey v. Camp*, 254 N.C. 443, 119 S.E. 2d 209 (1961). The cause of action is single and indivisible. *Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E. 2d 909 (1955). Plaintiff extinguished the "single and indivisible" cause of action against all four defendants when he consented to the judgment of dismissal "with prejudice" to his right to pursue his action further against defendants Biles. The legal import of the words "with prejudice" as applied to a judgment of dismissal is to terminate the action operating as *res judicata* and barring any further prosecution by the plaintiff of the same cause of action. 46 Am. Jur. 2d, § 482, p. 645; 149 A.L.R. 625-630.

Plaintiff urges on appeal that the words "with prejudice" do not appear in the effective portion of the order and that the action is merely dismissed, not dismissed "with prejudice." We find no merit in this contention. Nor do we agree with plaintiff's theory that dismissal of plaintiff's "action" is not synonymous with dismissal of the "cause of action."

Since we are of the opinion that the case is controlled by *Simpson v. Plyler, supra*, the judgment must be

Affirmed.

Judges PARKER and GRAHAM concur.

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State v. Butcher

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## STATE OF NORTH CAROLINA v. LAWRENCE C. BUTCHER

No. 716SC508

(Filed 15 December 1971)

Criminal Law §§ 114, 116, 168— instructions — mistaken assertion that defendant took the stand and testified

Trial court's instruction which mistakenly asserted that the defendant took the stand and testified as to material matters of the case is reversible error, even though the defendant did not call this misstatement of the evidence to the court's attention before the jury retired to consider the case.

APPEAL by defendant from *Cowper, Judge*, 29 March 1971 Session of Superior Court held in NORTHAMPTON County.

Defendant was tried upon a bill of indictment, proper in form, charging him with a felonious assault. Without objection, the defendant's case was consolidated for trial with that of one Ervin Moody, Jr., who was charged with feloniously assaulting the same victim on the same date. Upon a verdict of guilty of assault with a deadly weapon, a misdemeanor, the defendant was given an active prison sentence and appealed to the Court of Appeals, assigning error.

*Attorney General Morgan and Associate Attorney Reed for the State.*

*Bruce C. Johnson for defendant appellant.*

MALLARD, Chief Judge.

Defendant assigns as error the failure of the judge to allow his motion for judgment as of nonsuit. From the evidence, this occurrence seems to have been a Sunday night "shoot-out" on 23 June 1968 at a "juke box joint." Because a new trial is awarded, we refrain from a discussion of the evidence. We hold that on this record the evidence was sufficient to take the case to the jury, and the trial judge did not commit error in overruling the defendant's motion for judgment as of nonsuit.

Defendant also assigns as error the following portions of the judge's instructions to the jury.

"The defendant Butcher, Lawrence C. Butcher, testified about this affair and told Sheriff Ingram about it. He

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*testified here at the courthouse* and said that he had a pistol and that he had thrown it away, and he also said he could not have shot Wesley, because he was on the opposite side of the car. That he did shoot into the car with a .22 pistol. That Moody told him he shot back at the moving car and that he saw Jack Clanton shoot at him. (Emphasis added.)

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Now, the *defendant Butcher took the stand on his own behalf*. He said that he went to Squire's place on this night with Moody, and that they had come out and they heard a shot and saw his brother-in-law running. That he heard a second shot and that Moody was hit in the face and he left. That Jack Clanton shot at Moody first and then he shot at Butcher as they were walking around when they were shot, and that he saw Jack Clanton with the pistol standing by the car, and he saw the flash of the gun as it was discharged." (Emphasis added.)

The defendant's brother, Randolph Butcher, testified; but the defendant, Lawrence Butcher, did not take the stand and testify.

The record reveals that the defendant did not call this misstatement of the evidence to the attention of the judge before the jury retired to consider the case. Neither did the defendant request the judge to instruct the jury how they should consider the fact that the defendant did not testify.

The general rule is that where the judge, in charging the jury, misstates the evidence or the source of the evidence, such inaccuracy must be called to the attention of the judge before the jury retires to afford him an opportunity to correct it; otherwise, the objections thereto are deemed waived and will not be considered on appeal. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Ritter*, 239 N.C. 89, 79 S.E. 2d 164 (1953); *State v. Lambe*, 232 N.C. 570, 61 S.E. 2d 608 (1950); *State v. Walker*, 6 N.C. App. 740, 171 S.E. 2d 91 (1969); *State v. Bass*, 5 N.C. App. 429, 168 S.E. 2d 424 (1969). But this rule is not applicable where the misstatement is of a material fact not shown in evidence, in which event it is not required that the matter have been called to the judge's attention before the jury retires. *State v. Frizzelle*, 254 N.C. 457, 119 S.E. 2d 176 (1961); *Baxley v. Cavanaugh*, 243 N.C. 677, 92 S.E. 2d 68 (1956); *State v. McCoy*, 236 N.C. 121, 71 S.E. 2d

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921 (1952); *Piedmont Supply Co. v. Rozzell*, 235 N.C. 631, 70 S.E. 2d 677 (1952); *State v. Blackshear*, 10 N.C. App. 237, 178 S.E. 2d 105 (1970); *State v. Bradshaw*, 7 N.C. App. 97, 171 S.E. 2d 204 (1969); *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969); *State v. Boone*, 5 N.C. App. 194, 167 S.E. 2d 780 (1969); *State v. Bertha*, 4 N.C. App. 422, 167 S.E. 2d 33 (1969); 1 Strong, N. C. Index 2d, Appeal & Error, § 31.

Absent a special request, the judge is not required to instruct the jury that a defendant's failure to testify does not create any presumption against him. *State v. Rainey*, 236 N.C. 738, 74 S.E. 2d 39 (1953); *State v. Kelly*, 216 N.C. 627, 6 S.E. 2d 533 (1940); *State v. Jordan*, 216 N.C. 356, 5 S.E. 2d 156 (1939); 3 Strong, N. C. Index 2d, Criminal Law, § 116. However, when the trial judge elects, or is requested to charge the jury concerning the defendant's testimony, or lack of it, it becomes his duty to charge correctly on this phase of the case.

In 3 Strong, N. C. Index 2d, Criminal Law, § 116, the rule is stated:

"The failure of defendant to testify in his own behalf should not be made the subject of comment by the court *except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and that his failure to testify does not create any presumption against him.* \* \* \* " (Emphasis added.)

In the case before us, the defendant did not testify, yet the trial judge twice instructed the jury that the defendant did testify and informed the jury of what the defendant purportedly had said. Much of what the jury was told by the judge that the defendant testified to was, in substance, what the State's witness, Deputy Sheriff E. W. Ingram, testified that the defendant had told him. The statement that Mr. Ingram attributed to the defendant would be direct evidence that the defendant was firing a pistol at the car in which the victim was shot. The judge, in the challenged instructions, informed the jury that the defendant "told Sheriff Ingram about it." This was stating as a fact that the defendant had told the deputy sheriff about the matter, and it amounted to an expression of an opinion by the judge on a crucial fact in the case, in violation of G.S. 1-180 which prohibits the judge from expressing an opinion whether a fact is fully proven. It was for the jury, not the judge, to

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determine whether the defendant had in fact told the deputy sheriff about the matter; and if so, what it was that he had told him. In 5 Am. Jur. 2d, Appeal and Error, § 815, it is said:

“And it is reversible error for the court to assume that any fact necessary to establish the guilt of the defendant has been proved, and thus, by its instructions, to relieve the jury of its obligation to consider that issue.”

The trial judge, in the challenged instructions, has attributed much of what the deputy sheriff testified that the defendant told him, as having been testified to by the defendant himself. Without the testimony of Deputy Sheriff Ingram, the evidence for the State was not very strong against the defendant. We think, therefore, that when the judge instructed the jury that the defendant “*testified here at the courthouse*” to the substance of what the *deputy sheriff* said that the defendant had told him, the case of the State was strengthened to the prejudice of the defendant.

In addition, when the judge instructed the jury that the defendant testified “here at the courthouse” that he did shoot “into” the car, he again materially misstated the evidence in the case. There was no testimony by the deputy sheriff or anyone else that the defendant Butcher ever told anyone that he had shot “into” the car. The deputy sheriff did testify that Butcher told him that he had shot “at” the car. According to the evidence, the victim was on the inside of the car when he got shot, and therefore we think it was prejudicial for the trial judge, when the defendant did not testify, to inform the jury that the defendant testified that he did shoot “into” the car with a .22 pistol. The words “shooting into” a car and “shooting at” a car have different connotations. The word “into” has a more limited meaning in this context than the word “at.”

Of course, the jury, who had been present throughout the trial, knew that the defendant did not testify, but they must have been confused by the instruction of the judge, or they may have thought that the defendant had “testified here at the courthouse” at some other time. Even if we should assume, which we do not, that the jury considered the judge’s instructions as concerning only what the defendant Butcher had related to the deputy sheriff, this, in itself, was in part a misstatement of the evidence on a material fact and was prejudicial.

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Furthermore, we think that the fact that the defendant did not testify may have been unduly accentuated by these statements which the trial judge attributed to the defendant.

In *State v. Jordan, supra*, Justice Seawell, speaking for the Court about the trial judge's instructions to the jury concerning the defendant's *failure* to testify, said:

" \* \* \* . . . (I)t is debatable whether the judge does not do the defendant a disfavor by emphasizing the failure of the defendant to go upon the stand and, thereby, deepening an impression which is perhaps hardly ever removed by an instruction which requires a sort of mechanical control of thinking in the face of a strong natural inference. (citation omitted)

Upon these considerations, we think the matter had best be left to the sound judgment of the defending attorney whether he shall forego the instruction or specially ask for it."

In this connection, see also Anno., 18 A.L.R. 3d 1335.

Defendant has other assignments of error which we do not deem necessary to discuss.

For the reasons stated, we hold that the defendant is entitled to a new trial.

New trial.

Judges HEDRICK and GRAHAM concur.

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IRVIN WILLIS, EMPLOYEE PLAINTIFF v. J. M. DAVIS INDUSTRIES, INC., EMPLOYER; FIDELITY & CASUALTY COMPANY OF NEW YORK, CARRIER DEFENDANTS

No. 713IC741

(Filed 15 December 1971)

**1. Master and Servant § 77— workmen's compensation — claim for additional compensation — one-year limitation — time of claim**

A plaintiff's claim for additional compensation, which was made more than 12 months after receipt of his last compensation check but which was made within 12 months of his receipt of Industrial Commission Form 28B, is not barred by the one-year statute of limitation. G.S. 97-47; G.S. 97-80.

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**2. Master and Servant § 96— workmen's compensation — findings of fact — review on appeal**

Where the Industrial Commission's findings of fact are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the Commission for proper findings.

Chief Judge MALLARD dissenting.

APPEAL by plaintiff from a decision of the North Carolina Industrial Commission filed 7 May 1971.

This is a proceeding under the provisions of G.S. 97-47 of the North Carolina Workmen's Compensation Act wherein plaintiff seeks to recover additional compensation for change of condition pursuant to an award for a compensable injury sustained on 27 March 1968. The record reveals the following uncontroverted facts: The plaintiff sustained a compensable injury while employed by the defendant, J. M. Davis Industries, Inc., on 27 March 1968. Temporary total disability was paid to the plaintiff by the defendant carrier from 27 March 1968 through 23 July 1968. The defendant carrier's check in the amount of \$38.01, dated 23 July 1968, was cashed by the plaintiff on either 25 or 26 July 1968. Thereafter, the defendant sent I.C. Form 28B, dated 30 July 1968, to the Industrial Commission indicating that final compensation had been paid. On 6 November 1968, the defendant carrier wrote plaintiff's attorney asking whether the plaintiff would be interested in a compromise of the claim. On 30 July 1969, plaintiff's attorney wrote the Industrial Commission requesting hearing on the case. The letter from plaintiff's attorney to the Industrial Commission requesting a hearing was dated twelve months and either four or five days following the receipt by the plaintiff of his last compensation check.

The Industrial Commission, *inter alia*, made the following pertinent findings of fact:

"5. The defendants admitted liability under the Workmen's Compensation Act in this case and paid plaintiff compensation for temporary disability at the rate of \$38.01 per week for a period of 17 weeks, in the total amount of \$646.17. The last payment was forwarded to the claimant on July 23, 1968. The check that the defendants sent to the plaintiff was endorsed and cashed by him either July 25 or July 26, 1968. On July 30, 1968, the defendant insur-

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ance carrier prepared and furnished the plaintiff with a copy of North Carolina Industrial Commission Form 28B (report of compensation and medical paid). The Industrial Commission was furnished with the original, being received by said Commission on July 31, 1968. The Form 28B contained certain information, including the following:

'8. Total Amount of Compensation Paid, \$646.17.'

'10. Date Last Compensation Check Forwarded, July 23, 1968.'

'11. \*Total Medical Paid—Does this include final medical? (including nursing, hospital, drugs, etc.,)'.  
—————

'14. Does This Report Close the Case—including final compensation payment? Yes.'

—————  
'NOTICE TO EMPLOYEE: If the answer to Item 14 above is "Yes," this is to notify you that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing within one (1) year from the date of receipt of your last compensation check.'

\* \* \*

24. Plaintiff failed to notify the Commission within 12 months from the date of his last payment of compensation that he had a change of condition."

From an order of the Full Commission concluding as a matter of law that plaintiff's claim for additional compensation was barred by the provisions of G.S. 97-47, and that the defendants were not estopped to plead the lapse of time as a bar to plaintiff's claim, the plaintiff appealed.

*Wheatly & Mason by L. Patten Mason for plaintiff appellant.*

*Teague, Johnson, Patterson, Diltthey & Clay by Grady S. Patterson, Jr., for defendant appellee.*

HEDRICK, Judge.

This appeal presents two questions: (1) Are the defendants estopped to plead the lapse of time as a bar to plaintiff's claim

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for additional compensation? (2) Did the Commission make findings of fact determinative of all the questions at issue in this proceeding?

[1] G.S. 97-47 will bar a claim for additional compensation if not made within twelve months of the date of the last payment of compensation, unless the defendants are estopped to plead the lapse of time. *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971); *White v. Boat Corporation*, 261 N.C. 495, 135 S.E. 2d 216 (1964); *Sides v. Electric Co.*, 12 N.C. App. 312, 183 S.E. 2d 308 (1971).

The Industrial Commission's Rule XI 5, promulgated pursuant to statutory authority, G.S. 97-80, provides that the defendants will send a copy of I.C. Form 28B to the claimant with his last payment of compensation for either temporary total disability or permanent partial disability.

In discussing the carrier's duty to furnish the employee with a copy of Form 28B in accordance with the Commission's rule, Justice Rodman, in *White v. Boat Corporation*, *supra*, wrote:

" . . . If that form was not given the employee, as the rules require, he was deprived of information which the Commission specifically directed the carrier to furnish for his protection. It had legislative authority to require the insurance carrier to give employee this information. If the carrier failed to comply with the rule by giving employee notice of the limited time within which he could claim additional compensation, it failed to put the statute of limitations in operation."

In the present case the record discloses that the defendants did not comply with the Commission's Rule XI 5 by sending a copy of Form 28B to the claimant with his last compensation check. The letter from plaintiff's attorney to the Commission requesting a hearing, dated 30 July 1969, was received by the Commission on 31 July 1969, and Form 28B, dated 30 July 1968, was received by the Commission on 31 July 1968. The Commission found as a fact that the defendants prepared and furnished the plaintiff with a copy of Form 28B on 30 July 1968. Thus, it appears that plaintiff's claim for additional compensation was made within twelve months of the time he was furnished a copy of Form 28B. Therefore, we hold the Commission was in error

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in concluding as a matter of law that defendants were not estopped to plead the lapse of time as a bar to plaintiff's claim for additional compensation.

[2] Plaintiff contends the Commission failed to make findings of fact determining whether plaintiff's present condition resulted from the compensable injury sustained on 27 March 1968. Obviously, one of the principal questions at issue in this proceeding is whether plaintiff's present condition is a result of the injury sustained on 27 March 1968. It was the duty of the Commission to make findings of fact determinative of this question, and if findings of fact are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the Commission for proper findings. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952); *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968); *Hudson v. Stevens and Co.*, 12 N.C. App. 366, 183 S.E. 2d 296 (1971). The Commission's order made a detailed recital of plaintiff's condition from the date of the injury until the time of the hearing. In its findings of fact the Commission recited a rather complete history of plaintiff's treatment by Dr. Goldner, and the doctor's diagnosis and prognosis of plaintiff's physical and mental condition, but nowhere did the Commission make a finding as to whether the condition described by Dr. Goldner bore any causal relation to the compensable injury of 27 March 1968. In Finding of Fact No. 13, the Commission merely stated that it was Dr. Goldner's opinion that the plaintiff had nerve root irritation probably secondary to trauma to the intervertebral disc.

We do not deem it necessary to recite the medical evidence. Suffice it to say, there is evidence in the record from which the Commission could make a finding as to whether plaintiff's present condition was or was not a result of the injury on 27 March 1968.

For the reasons stated, so much of the Commission's order as concludes as a matter of law that the defendants are not estopped to plead the lapse of time as a bar to plaintiff's claim for additional compensation is reversed, and the proceeding is remanded for the Commission to make findings determinative of the questions at issue and proceed as the law requires.

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Reversed and remanded.

Judge GRAHAM concurs.

Chief Judge MALLARD dissents.

Chief Judge MALLARD dissenting.

G.S. 97-80 provides that the Commission may make rules not inconsistent with Article 1 of Chapter 97 of the General Statutes. The Commission has made the following rule:

“The defendants will furnish the claimant for his record a copy of I. C. Form 21 and I. C. Form 26 when the claimant signs said forms, and defendants will send a copy of I. C. Form 28B to the claimant with his last payment of compensation for either temporary total disability or permanent partial disability.” I.C. Rule XI 5.

The statute G.S. 97-47, which is a part of Article 1 of Chapter 97, states specifically that “. . . no such review shall be made after twelve months from the *date of the last payment* of compensation pursuant to an award under this article . . . .” (Emphasis added.)

To allow a review after more than twelve months have elapsed from the date of the last payment of compensation pursuant to an award under the article, because of a failure to comply with a rule of the Commission, would be inconsistent with the provisions of G.S. 97-47. Absent equitable grounds, which do not appear in this case, the carrier is not estopped to plead the provisions of the statute. The statute controls over the rule of the Commission. I think the order of the Commission is correct, and plaintiff’s right to review is barred as a matter of law.

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State v. Fountain

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## STATE OF NORTH CAROLINA v. MAX BRADSHAW FOUNTAIN

No. 714SC604

(Filed 15 December 1971)

**1. Automobiles § 127— driving under the influence — second offense — sufficiency of evidence**

The trial court did not err in the denial of defendant's motion for nonsuit with respect to the "second offense" portion of a charge of driving under the influence where the State introduced a driver's license record from the Department of Motor Vehicles which showed, and it was stipulated that such record showed, that a person having the same name as defendant was convicted of driving under the influence in the Jacksonville Municipal Court on 17 November 1964, and defendant testified on direct examination that "seven years ago in 1964 there was a case of Driving Under the Influence," notwithstanding there was no admission by defendant that he was the same person referred to in the driver's license record and in the stipulation.

**2. Criminal Law § 166— abandonment of exceptions**

An exception not argued in the brief is deemed abandoned. Court of Appeals Rule 28.

**3. Arrest and Bail § 6— resisting arrest — failure to charge on illegal arrest**

In a prosecution for resisting arrest, the trial court did not err in failing to charge that if the arrest was illegal, defendant had the right to resist with such force as was reasonably necessary, where the evidence showed that the arrest was legal.

**4. Indictment and Warrant § 12— failure to write amendment into warrant — stipulation that warrant was amended**

Defendant's contention that the warrant was not properly amended because the amendment was not actually written into the warrant *is held* without merit where the solicitor, in making the motion to amend, orally stated all the elements of the offense charged, defendant thereafter entered a plea of not guilty to that charge, and the record shows that the solicitor and defense counsel stipulated "that the warrant was amended to conform to the foregoing amendments."

APPEAL by defendant from *James, Judge*, 22 February 1971 Session of ONSLOW Superior Court.

Defendant was charged with second offense of driving under the influence, resisting arrest, and assault on an officer. At the end of all the evidence motion for nonsuit was allowed as to the assault charge. The jury returned a verdict of guilty as to the charges of resisting arrest and second offense of driving under the influence. From judgment entered on the verdict, defendant appealed.

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State v. Fountain

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*Attorney General Morgan, by Assistant Attorneys General Melvin and Ray, for the State.*

*Turner and Harrison, by J. Harvey Turner, for defendant appellant.*

MORRIS, Judge.

Defendant first assigns as error the denial of his motion for nonsuit with respect to the charge of resisting arrest and with respect to the "second offense" portion of the charge of driving under the influence.

The evidence for the State tended to show that at about 11:30 p.m. on 6 January 1971 defendant was driving on U.S. Highway 258 when patrolman Bron met him. Defendant was traveling at a high rate of speed in a 45 mile-per-hour speed zone. Bron turned around and gave pursuit. Defendant's vehicle was veering from his lane of travel across the center line and back into his lane of travel. Defendant's vehicle got up to 80 miles per hour in a 60 mile-per-hour speed zone and made no attempt to stop when Bron turned on his blue light. At that time Bron was about three car lengths behind defendant. Bron also turned on his siren, but defendant made no attempt to stop. About 6/10 of a mile from where Bron first turned on his blue light, defendant began to slow down and turned in a driveway with Bron right behind him. Defendant stopped in the driveway and Bron parked about a car length behind him, left his blue light on, and walked up to defendant's car as he was getting out. He was unsteady and had to hold onto the car to exit it completely. His eyes were very glossy and red and blood-shot. Bron asked defendant to get in the patrol car. As he walked to get in the car, he had to balance himself and held onto the fender. After he got in the car, Bron could "smell that he had some type of alcoholic beverage on his breath." Bron advised defendant that he was under arrest for driving under the influence and speeding. Defendant reached for the door handle and said "Hell, no, I ain't either," and proceeded to get out of the car. Bron got out of the patrol car, and went to defendant with his ticket book and pencil in his left hand. Bron walked up to defendant and grabbed him by his arm with his right hand in an attempt to stop defendant, whereupon defendant struck Bron in the face with his open hand. Bron then knocked defendant to the ground and attempted to put handcuffs

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on him. While he was attempting to get the handcuffs open, defendant came up at him and Bron sprayed Mace in defendant's face. Bron lost his balance and fell and defendant got to the side door of the house and hollered to be let in. A woman let him in the house. Bron went back to his patrol car and radioed for assistance. When other officers arrived they asked defendant to come out, but he refused to do so. Shortly, however, his wife came to the door and said one of the officers could come in and talk to him. After being assured that she had no gun, an officer went in and, after a scuffle and assisted by another officer, brought defendant out. He was still belligerent and fighting. One of the officers hit him with his blackjack. Defendant was finally subdued and was put in the patrol car and taken to a magistrate's office where defendant's attorney, who had been called by defendant, was waiting. Defendant was very talkative and at first agreed to take the breathalyzer test but refused on the advice of his attorney. He was bloody about the head and face and his attorney asked that he be taken to the hospital. The officer agreed to do this as soon as he finished his report. However, defendant's brother came in and took him.

Defendant's evidence tended to show that he had had three or four beers, was not intoxicated, was unfamiliar with the car he was driving, and its speedometer was not accurate. He went in his house and told his wife that she was not to let the officers in until they got a warrant for his arrest; and that he was accused of speeding, the officer had "maced him," it made him mad, and he was not going until they got a warrant. After he got in the house, he sat down and ate his supper and called his attorney who asked to speak to one of the officers. While he was talking to his attorney, the officers broke the glass in the door, came in, knocked his wife down, walked over her and took him forcibly from the phone and out of the house. They leaned him against his wife's car and proceeded to beat him with their blackjacks. The gun his son pointed toward the officers was a broken BB gun.

[1] The State introduced in evidence the driver's license check from the North Carolina Department of Motor Vehicles of Max Bradshaw Fountain, Box 1, Jacksonville, North Carolina, for the purpose of proving the previous offense of driving while under the influence of alcoholic beverage, conviction being 17 November 1964, Jacksonville Municipal Court. Among the stipu-

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lations included in the record is the following: "IT IS FURTHER STIPULATED: Driver's-License-Record Check of the North Carolina Department of Motor Vehicles (State's Exhibit No. 1) shows that Max Bradshaw Fountain was convicted of Driving While Intoxicated on July 6, 1964 in the Jacksonville Municipal Court on November 17, 1964 and will not be included herein as an exhibit." Defendant testified on direct examination as to various charges, convictions, and pleas in cases involving motor vehicle violations and stated: "Seven years ago in 1964 there was a case of Driving Under the Influence." Defendant contends on appeal that his motion for nonsuit as to the "second offense" portion of the charge of driving under the influence should have been granted because there was no admission by defendant that he was the same person referred to in the exhibit and the stipulation and, in the absence of judicial admission, the question of whether there was a former conviction was for the jury. Defendant relies on *State v. Powell*, 254 N.C. 231, 118 S.E. 2d 617 (1961). There the State introduced the record of a prior conviction. There was no further evidence adduced referring to a former conviction, and although defendant testified, he was not examined on direct or cross-examination with respect to any former conviction. The court instructed the jury that defendant had admitted in open court that he had been convicted of driving under the influence and did not leave with them the determination of that question. In the case before us, however, in addition to defendant's own testimony indicating a prior conviction, there is a stipulation in the record which, in our opinion, leaves no doubt but that defendant had a prior conviction. Nevertheless, conceding *arguendo*, that there was no such admission, the court instructed the jury, in substance, that the defendant was charged with the second offense of driving under the influence; that the State had offered evidence, and the defendant, as the court recalled the defendant's own evidence, had indicated that he was convicted on a prior occasion in 1964, which "constitutes some evidence that he is guilty of the second offense of driving under the influence, if you find him to be guilty of that offense on this occasion." This assignment of error is without merit and is overruled.

[2] Defendant makes no argument with respect to his exception to the denial of his motion for nonsuit on the charge of resisting arrest, and this exception is deemed abandoned.

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State v. Fountain

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Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[3] The only other exception brought forward and argued in defendant's brief is exception No. 5 which is directed to the charge of the court to the jury. Although the exception is not properly before us, we have considered it and find no prejudicial error. Defendant contends that the court failed to charge that if the arrest was illegal, the defendant had the right to resist with such force as was reasonably necessary. In our opinion the legality of the arrest is too obvious to merit discussion. This exception is overruled.

[4] Defendant has filed with the Court his written motion to arrest judgment contending that the warrant was defective as to the charge of resisting arrest, that the State moved to amend the warrant, that there was no actual ruling by the court, but by stipulation it was allowed although the amendment was not actually executed by writing the amendment into the allegations of the warrants. Defendant urges that the fatal defect, therefore, was not cured. The record shows that in its motion to amend, the State orally stated all the elements of the violation charged and following that asked the defendant how he pled to that charge. Whereupon counsel answered "not guilty." The record shows the following: "Stipulations by Assistant Solicitor and Counsel for Defendant: IT IS STIPULATED that the warrant was amended to conform to the foregoing amendments." Defendant cannot now be heard to say that the warrant was not properly amended. The motion is denied.

Defendant has had a fair and impartial trial in which we find no prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

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State v. Spencer

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STATE OF NORTH CAROLINA v. JAMES MACKEL SPENCER

No. 712SC749

(Filed 15 December 1971)

**1. Constitutional Law § 30— speedy trial — ten months' delay between arrest and trial**

A ten months' delay between defendant's arrest and trial did not constitute a violation of defendant's right to a speedy trial, where (1) there was a backlog of criminal cases on the docket; (2) on one occasion defendant's counsel assented to the solicitor's request for a continuance; (3) there was no showing that defendant requested an earlier trial or complained of any delay; and (4) there was no evidence that the delay was due to the neglect or wilfulness of the solicitor.

**2. Searches and Seizures § 3— constitutionality of search warrant**

The search warrant and affidavit in a narcotics prosecution was without constitutional defect.

**3. Narcotics § 4— growing and possessing marijuana — evidence that marijuana was under defendant's control**

In a prosecution charging defendant with the possession and the growing of marijuana, the State's evidence that a box of marijuana leaves was found in a pig pen situated 25 yards behind defendant's living quarters and that more than 100 marijuana plants were found growing in a corn field 75 to 100 yards from defendant's house and to the rear of the pig pen, *is held* sufficient to support a jury finding that the pig pen and the corn field were under defendant's control, especially where there was evidence that an unintersected path led from the pig pen to the corn field.

APPEAL by defendant from *Rouse, Judge*, May 1971 Criminal Session of Superior Court held in BEAUFORT County.

Defendant was charged under separate bills of indictment with growing marijuana and possessing marijuana in excess of one gram. The cases were consolidated for trial.

The State's evidence tended to show the following: Defendant lives in a combination store and residence in a rural area of Beaufort County. On 15 July 1970 agents of the State Bureau of Investigation, armed with a search warrant, searched defendant's residence and the outside area. A jar containing marijuana seeds was found in defendant's bedroom and a box containing marijuana leaves, weighing 82.2 grams, was found in a pig pen situated approximately 25 yards behind defendant's living quarters. More than 100 marijuana plants were found growing in a corn field approximately 75 to 100 yards from

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defendant's house and to the rear of the pig pen. A wide path led from the rear of a fence enclosing the pig pen to the corn field. There were no intersecting or adjoining paths.

Defendant did not testify or offer evidence.

The jury returned verdicts of guilty as charged and the court imposed concurrent sentences of 2 years imprisonment.

*Attorney General Morgan by Assistant Attorney General Wood for the State.*

*Wilkinson, Vosburgh & Thompson by John A. Wilkinson for defendant appellant.*

GRAHAM, Judge.

[1] Defendant moved to quash the bills of indictment on the ground that his constitutional right to a speedy trial had been violated. The court denied the motion and defendant assigns this as error.

"Whether a speedy trial is afforded must be determined in the light of the circumstances of each particular case. In the absence of a statutory standard, what is a fair and reasonable time is within the discretion of the court." *State v. Lowry and State v. Mallory*, 263 N.C. 536, 542, 139 S.E. 2d 870, 875.

The circumstances of this case are set forth in findings of fact entered by the trial judge. These findings, which are unchallenged by any exception, indicate that defendant was arrested on 15 July 1970 and was given a preliminary hearing one week later. On the day of his preliminary hearing defendant gave bond for his appearance in Superior Court and was released from custody. During the period between defendant's preliminary hearing and his trial, nine weeks of criminal court were held in Beaufort County. A backlog of criminal cases awaited trial in Beaufort County from the time of defendant's indictment until his trial and at no time was the criminal court docket current. On one occasion defendant's counsel assented to a continuance upon being advised by the solicitor that witnesses for the State were involved in undercover investigations into the use and sale of marijuana in the area and that their appearance in court during these investigations would be a disadvantage to their work.

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The record does not show that defendant requested that his case be brought to trial or made complaint as to any delay until the week the case was actually tried. It is generally held that an accused is not entitled to a discharge for delay in bringing him to trial unless it appears that he resisted postponement, demanded a trial, or made some effort to procure a speedier trial than the State afforded him. *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309. The record contains no testimony, affidavits, or other evidence tending to support defendant's contention that the delay in bringing his case to trial caused a reasonable probability of prejudice against him. Neither is there evidence to suggest that the delay was deliberately and unnecessarily occasioned by the State. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274; *State v. Moffitt*, 11 N.C. App. 337, 181 S.E. 2d 184. The burden is on the accused to show that the delay in bringing him to trial was due to the neglect or willfulness of the prosecution. *State v. Hollars*, *supra*.

After making findings of fact, which have been summarized herein, the court concluded that the delay of ten months in bringing defendant's case to trial was not so unreasonable as to create a reasonable possibility of prejudice and that the delay was not deliberately and unnecessarily occasioned by the State. The record supports this conclusion and defendant's assignment of error with respect thereto is overruled.

[2] Defendant's second contention is that the search warrant under which the search of his premises was conducted should have been quashed and the evidence obtained as a result of the search suppressed. He argues that the search warrant, and the affidavit upon which it was based, failed to comply with the tests laid down in the case of *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964). The requirements of *Aguilar* have been thoroughly discussed in cases decided by the appellate courts of this State. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755; *State v. Flowers*, 12 N.C. App. 487, 183 S.E. 2d 820; *State v. Staley*, 7 N.C. App. 345, 172 S.E. 2d 293.

We see nothing to be gained from further discussion here of the principles enunciated in *Aguilar* and expanded in *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969) and subsequent cases. Suffice to say that we have carefully examined the warrant in the light of these decisions and

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we find the warrant and the affidavit it contains to be without constitutional defect.

[3] Defendant next contends that the court erred in denying his motions to dismiss the charges for a lack of sufficient evidence. He points out that there was no evidence that the marijuana seed found in his house weighed more than one gram, and consequently that possession of these seeds could not constitute felonious possession of marijuana. The court instructed the jury to this effect. Defendant further argues that the evidence does not connect him with the pig pen where a quantity of marijuana weighing in excess of one gram was found, or with the corn field where marijuana was found growing.

It is conceded that it was not shown that defendant owned the property on which the pig pen was situated or the land on which the marijuana plants were growing. However, the evidence was sufficient to permit the jury to infer that these areas were under defendant's control. The pig pen was within 25 yards of the rear of his residence. Only the backyard separated the pig pen and the house, and no other residences were located close enough to suggest that the pig pen was an appurtenant structure to another residence. Defendant was seen around the pig pen from time to time. The marijuana seeds located in defendant's house, the marijuana plants growing within 100 yards thereof and marijuana leaves located in the pig pen between the house and the field constitute sufficient evidence to take the case to the jury on both charges.

Evidence that an unintersected path led from the area of the pig pen to the field where the marijuana was growing strengthens the State's case. In *State v. Harrison*, 239 N.C. 659, 80 S.E. 2d 481, a jug of nontax-paid whiskey was found near a barbecue pit used by defendant. It was located approximately 75 yards from the defendant's house and there was a path leading from defendant's house to the pit. There were no other paths intersecting or joining and the jug of whiskey was found about 15 feet from the end of the path. The State's witnesses admitted they did not know who owned the premises where the whiskey was found. Defendant argued that since the State failed to offer evidence that the whiskey was found on his premises, the facts relating to its discovery and seizure, as well as the container and its contents, should have been excluded upon his objection. In rejecting this contention the court stated: "The

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facts and circumstances incident to the discovery and seizure of the gallon of nontax-paid liquor, together with the uncertainty as to whether it was actually found on the premises of the defendant, or within a few yards thereof, went to its weight and credibility but not to its admissibility."

We hold that defendant's motions to dismiss were properly overruled.

The defendant has brought forward and argued several exceptions to the charge. A careful review of the charge in its entirety fails to convince us that it contains any error sufficiently prejudicial to warrant a new trial.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. JOHN EDWARD FOWLER, JR.

No. 715SC514

(Filed 15 December 1971)

1. Criminal Law §§ 131, 158; Homicide § 32— record on appeal — conclusiveness as to matters omitted — new trial for newly discovered evidence

The Court of Appeals could not consider two letters that were in defendant's brief but not in the record on appeal, which letters purported to impeach the State's chief witness by showing that the witness and his wife, who was the homicide victim, had not been married in Orangeburg, South Carolina; in any event, the letters would be irrelevant in a homicide prosecution and could not serve as the basis for a new trial, since the letters merely contradicted the witness' testimony that he and his wife were married in Orangeburg, South Carolina.

2. Criminal Law § 170— remarks of trial court to defendant — harmless error

A statement made by the trial judge while defendant was answering a question on cross-examination, "Just answer yes or no. If you want to make a speech to the jury you can do that later . . . you or your attorney or both if you would like to," while disapproved, held not prejudicial to the defendant.

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**3. Criminal Law § 115; Homicide § 30— instruction on lesser offenses**

The trial judge in a homicide prosecution twice instructed the jury that although the indictment charged murder in the first degree, the State had elected to try defendant for murder in the second degree, and that the charge of first degree murder was not to be considered. *Held*: The instructions were not prejudicial.

**4. Criminal Law § 113— recapitulation of defendant's testimony — evidence of "law violations"**

Defendant could not complain of the trial judge's recapitulation of his testimony that he had "various law violations" in the past, where defendant made no objection to such testimony at the time it was made.

**APPEAL from *Parker, Judge*, 11 January 1971 Session of Superior Court held in NEW HANOVER County.**

Defendant was brought to trial under separate bills of indictment, proper in form, charging him with the first degree murder of Martha Ann Allen and felonious assault upon Moses Allen. The State elected not to seek a conviction for the capital offense of murder, but to try defendant under that bill of indictment for murder in the second degree.

The cases were consolidated for trial and the State presented evidence tending to show the following: Moses Allen returned to his apartment from work at approximately 12:30 or 1:00 on the afternoon of 12 December 1970. His wife, Martha Ann Allen, defendant, and several other persons were there. Those present were drinking beer and wine. Approximately two hours later, defendant cut Martha Ann Allen with a knife and the knife wounds caused her death. Allen described the incident:

"Martha, myself, and John Fowler went into the rear bedroom. Martha Ann laid down on the bed, and I sat on the foot of the bed. We had a drink, and then John Fowler said that he was going to mess up Martha Ann, but first he had to get me. Then he struck me on the side of my face with a knife, and cut the left side of my face. Martha Ann moved from behind me, and John Fowler cut her throat.

Both Martha Ann and I were sitting on the bed when we were cut. But Martha Ann was coming off the bed when she was cut.

I went to the bathroom and washed my face, and Martha Ann came into the bathroom and fell on the floor. The

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cut on my face required eighteen stitches, and I didn't see Martha Ann alive after that day. Neither Martha Ann nor I did anything to John Fowler to make him cut us."

Defendant testified that deceased took money from his pocketbook while he was taking a nap in another room. He testified that after finishing his nap, he went into the other bedroom and asked deceased for his money. "Moses got mad at me, asking me why I was accusing his wife of taking my money. Moses reached out and got a round instrument. I don't know if it was a pool stick or a broom handle, but he hit me with it. He hit me on my arm, I threw my arm up to knock the stick away, and I knocked him back on the bed and started out the door and Martha jumped up. I pushed her out of the door with my left hand and walked out into the hall when Charles Dowe met me there and we left the house together. . . . I did not kill Martha Ann. I hit Moses with my fist and pushed Martha away when I was trying to walk out of the door."

The jury returned verdicts of guilty and judgments were entered imposing active consecutive prison sentences. Defendant appealed to this Court.

*Attorney General Morgan by Assistant Attorney General Hudson for the State.*

*Charles E. Rice III for defendant appellant.*

GRAHAM, Judge.

[1] On cross-examination defendant's counsel asked the State's witness, Moses Allen, "[w]hen and where were you and Martha Ann married?" The witness answered, "In Conway, South Carolina."

No objection or motion to strike this evidence was made and defendant offered no evidence to the contrary. Defendant now argues in his brief, however, that this statement constituted "perjured testimony" and that the court erred in permitting it. He attempts to support this argument with two letters included in his brief as exhibits. The first letter, purportedly from defendant to the Judge of Probate in Conway, South Carolina, states in pertinent part:

"Sir is it true or falst about a Marrage was Soppose to taken Place there Between the man Name Mases Allen

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an Martha Ann Bath of Wilmington N. C. the year 1968. or 1969. Bath Nigroes Race Plase. May I here Froom you?"

The second letter purports to be the reply of the Probate Judge and it provides in pertinent part:

"We have checked our records from June, 1967 through June, 1970 and do not find where we have issued this Marriage License. If there is another date that we could check for you we will be glad to do so."

Needless to say, these letters are not a part of the record on appeal and cannot be considered. Moreover, even if the letters were properly incorporated in a motion for a new trial on the ground of newly discovered evidence, defendant would be entitled to no relief. The fact that the parties may not have been married in Conway, South Carolina, as stated by the witness, would be immaterial and irrelevant in this prosecution for murder. Furthermore, a new trial will not be awarded where, as here, the newly discovered evidence does nothing more than tend to contradict, discredit or impeach a former witness, or where it fails to show that upon a new trial a different result would probably be reached. *State v. Casey*, 201 N.C. 620, 161 S.E. 81.

[2] In his second assignment of error, defendant challenges a statement made by the trial judge while defendant was answering a question asked on cross-examination. The court stated:

"Just answer yes or no. If you want to make a speech to the jury you can do that later. You just answer his question. You can make your speech later if you want to. You or your attorney or both if you would like to."

The judge's statement came during an unresponsive answer in which defendant appears to have started expounding at length as to why he was telling the truth. While we do not approve of the language used by the trial judge, we feel that under the circumstances his interruption of defendant's testimony was a proper exercise of his discretionary power to supervise the trial and that no prejudice resulted to defendant. A remark by the court is ordinarily held not prejudicial when it amounts to no more than a ruling on a question or where it is made to ex-

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pedite the trial. *State v. Hooks*, 228 N.C. 689, 47 S.E. 2d 234; *State v. Cox*, 6 N.C. App. 18, 169 S.E. 2d 134.

[3] In his charge the trial judge twice reminded the jury that although the bill of indictment charged murder in the first degree, the State had elected to try defendant for murder in the second degree, and that the charge of first degree murder was not to be considered. Defendant assigns this as error, contending that it amounted to a comment on the evidence to his prejudice. This assignment of error is overruled. See *State v. Ray*, 12 N.C. App. 646, 184 S.E. 2d 391.

[4] Finally, defendant assigns as error the judge's recapitulation of his testimony, which included defendant's statement that he had "various law violations" in the past. There is no contention that the judge did not correctly recall this portion of defendant's testimony or that defendant's testimony was misstated by the court in any way. Rather, defendant contends that it was incompetent evidence and should not have been repeated by the court. Suffice to say, the proper manner to have raised this question would have been through an objection at the time defendant testified. No objection to any of defendant's testimony appears in the record.

We have reviewed the entire record and find that defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. ELIZABETH CRADLE

No. 7115SC696

(Filed 15 December 1971)

1. Constitutional Law § 32— indigent defendant — right to court-appointed counsel

An indigent defendant is entitled to court-assigned counsel and to have such counsel present at every critical stage in the criminal process, including a preliminary hearing. G.S. 7A-450 et seq.

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**2. Constitutional Law § 32— findings on indigency — refusal to appoint counsel for preliminary hearing — subsequent appointment of counsel in superior court**

The district court did not err in determining that defendant was not indigent at that time and was not entitled to have an attorney appointed to represent her at her preliminary hearing, notwithstanding the superior court subsequently found that defendant was indigent and appointed counsel to represent her in her trial in the superior court.

**3. Criminal Law § 91— denial of continuance**

The trial court did not err in the denial of defendant's motion for a continuance of her trial for forgery and uttering a forged instrument on 7 June, where counsel had been appointed to represent defendant on 1 June, counsel conferred with defendant on 3 June, and counsel conferred with the solicitor on 4 June and indicated that he was prepared for trial of this case.

**4. Forgery § 2— uttering a forged check**

The State's evidence was sufficient for the jury in this prosecution for uttering a forged check where it tended to show that defendant cashed a check in which her deceased mother was named as payee, that defendant endorsed the name of her deceased mother on the back of the check, and that the purported maker of the check had not made such a check.

APPEAL from *Copeland*, *Special Judge*, 7 June 1971 Session, ORANGE Superior Court.

The defendant was tried on a two-count bill of indictment. The first count charged the felony of forgery of a check in the amount of \$50 and the second count charged the felony of uttering the forged check.

At the close of the State's evidence the trial judge sustained a motion for a directed verdict of not guilty as to the count of forgery. The count of uttering was submitted to the jury and from a verdict of guilty on that count and the imposition of a prison sentence the defendant appealed.

*Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey for the State.*

*Roy M. Cole; Loflin, Anderson and Loflin by Thomas F. Loflin III for defendant appellant.*

CAMPBELL, Judge.

The first question presented by the defendant is whether her constitutional rights were violated by not having an attorney appointed to represent her at the preliminary hearing. The de-

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fendant was arrested on 5 March 1971 pursuant to a warrant which had been issued on 25 February 1971. While the record is not clear, apparently the defendant was not held in custody but was released under a surety bond. The case came on for hearing in the district court on 23 March 1971. The defendant filed an affidavit dated 22 March 1971 asserting that she was financially unable to employ counsel and requesting the court to assign counsel to represent her. In this affidavit she represented that neither she nor her husband was employed; that she had no money or other income and no property; that she owed about \$3,000 and owned a 1958 Chevrolet automobile which was paid for. The record discloses that a hearing was held before the district judge on the request for assignment of counsel and the judge entered an order finding:

"It appearing to the undersigned Judge from the affirmations made by the applicant and after due inquiry made, that the applicant is financially able to provide the necessary expenses of legal representation, it is, therefore,

ORDERED AND ADJUDGED that [she] is not an indigent, and [her] request is hereby denied."

Thereafter under date of 30 March 1971, at a preliminary hearing, the district court found probable cause of defendant's guilt and bound her over to the April 20, 1971 Session of the Superior Court. An appearance bond was set at \$1,000. Defendant apparently complied with the \$1,000 bond provision and remained at liberty.

On 26 April 1971 the grand jury returned the two-court bill of indictment on which the defendant was tried.

On 1 June 1971 Judge Copeland in the Superior Court conducted another hearing as to the indigency of the defendant and found that she was at that time indigent, and appointed Mr. Cole to represent her.

[1] It is well recognized that an indigent defendant is entitled to court-assigned counsel and to have such counsel present at every critical stage in the criminal process including a preliminary hearing. *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970). In fact, this right to counsel is provided by statute in North Carolina. G.S. 7A-450, *et seq.*

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The entitlement to counsel at public expense is dependent upon the defendant's being an indigent. The statute provides that: "The court shall make the final determination." G.S. 7A-453(b). The statute also provides "The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation." G.S. 7A-450(c). The record in the instant case reveals that the district judge on 23 March 1971 conducted a hearing and, based upon affirmations made by the defendant and "after due inquiry made," determined that the defendant was not an indigent and was not entitled to an attorney at public expense. Subsequently, and in keeping with the statutes, the superior court judge on 1 June 1971 conducted another hearing and at this time determined that the defendant was an indigent and entitled to the services of an attorney at public expense and such an attorney was furnished.

[2] There is nothing in the record before us to show that the district judge on 23 March 1971 committed any error in determining at that time that the defendant was not an indigent and was not entitled to an attorney at public expense. There is a presumption in favor of the regularity of the hearing and the order entered by the district judge. 3 Strong, N. C. Index 2d, Criminal Law, § 167; *State v. Jenkins*, 12 N.C. App. 387, 183 S.E. 2d 268 (1971). Also, we note that defendant is represented on this appeal by privately-employed counsel as well as by court-appointed counsel. We also note that no contention was made by the defendant in the superior court that the district court committed error in failing to appoint counsel to represent the defendant at the preliminary hearing, and no request was made that the case be remanded to the district court for correction. We find no merit in this assignment of error.

[3] The defendant assigns for error the refusal of the trial judge to grant a continuance of the trial so as to give trial counsel additional time to prepare. The record discloses that counsel was appointed for the defendant on 1 June 1971 and at that time the defendant was instructed to communicate with her counsel. Counsel, at that time, had four other cases pending for the defendant. Defendant did not communicate with her counsel as instructed to do by the court. Nevertheless, on 3 June 1971, counsel was advised of this particular case and on that day conferred with the defendant. The record further discloses

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that not later than 4 June 1971 counsel for the defendant conferred with the solicitor and indicated to the solicitor that in this case he was prepared for trial. The solicitor in turn advised counsel for the defendant that there might be other cases called for trial, but that this particular case likewise was marked on the trial calendar for trial. The record reveals no prejudice to the defendant in proceeding with the trial on 7 June 1971. We find no merit in this assignment of error.

The defendant challenges the sufficiency of the evidence to be submitted to the jury and to sustain the verdict of the jury. The defendant contended that the case should have been dismissed for insufficient evidence.

[4] In brief summary, the evidence in the light most favorable to the State shows that on 15 January 1971 the defendant took a check dated that day and payable to the order of "Lena Mae Hopkins" in the amount of \$50 to a place of business known as Central Carolina Farmers and requested the office manager to cash it. She represented to the office manager that the maker of the check, a Mr. Duty, was the man she worked for. In the presence of the office manager the defendant endorsed the check on the back with the name "Lena Mae Hopkins" and received the \$50. Defendant's mother was "Lena Mae Rigsbee" but she sometimes went under the name of "Lena Mae Hopkins." At that particular time, on 15 January 1971, defendant's mother was dead and had been dead for approximately two years. When the check was presented to the bank on which it was drawn, payment thereon was refused for that no such account was then existent at the bank. The purported maker of the check, Mr. Duty, had not made such a check. This evidence was ample to sustain the conviction of the defendant for uttering a forged instrument. All of the necessary elements of the crime were established. *State v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22 (1967).

The remaining assignments of error have been considered, and we find them to be without merit.

No error.

Judges MORRIS and PARKER concur.

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STATE OF NORTH CAROLINA v. PATRICK C. NICKERSON

No. 713SC688

(Filed 15 December 1971)

**Criminal Law § 84; Searches and Seizures § 1— standing to object to illegal search — apartment rented by another**

Defendant had no standing to object to the illegal search of an apartment rented by a female friend of defendant, notwithstanding defendant stayed overnight in the apartment three or four nights a week and had been given permission to use the apartment whenever he pleased; consequently, an M-14 rifle discovered during the search was properly admitted in evidence in the trial of defendant for homicide.

APPEAL by defendant from *Rouse, Judge*, 5 April 1971 Session of Superior Court held in CRAVEN County.

The defendant, along with Barry Alfred Ferguson, John J. Andrade, and Roby Wesley Lancaster, was charged with the murder of Gregory Clark Amerson on Saturday, 26 September 1970. Defendant and John J. Andrade were tried jointly. Roby Wesley Lancaster, one of the four defendants, testified for the State.

The State's evidence tended to show that on 26 September 1970 the four defendants decided to get some money by robbing a gas station. A M-14 rifle was secured and the four walked to Darnell's Gulf Station on Broad Street in the city of New Bern. Before arriving at Darnell's Gulf Station, defendant Nickerson took possession of the M-14 rifle. While defendants were observing the activities in and around the Gulf Station, the deceased, Gregory Clark Amerson, pushed his vehicle onto the parking area of the Gulf Station and began working upon its engine. Defendants Nickerson and Andrade decided to rob the man who was working on his car. Several shots were heard from a high powered rifle; defendants, Nickerson and Andrade, were observed running from the scene, defendant Nickerson carrying the M-14 rifle. The deceased was hit by three shots, two of which caused his immediate death. Three 7.62 millimeter expended cartridge cases were found near the scene. The M-14 rifle is a caliber 7.62 millimeter.

The State's evidence further tended to show that on Sunday, 27 September 1970, or Monday, 28 September 1970, de-

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defendant Nickerson went to the apartment of one Shirley Mae Carr stating that he wanted to leave something upstairs; that he went upstairs in her apartment and then left. On Wednesday, 30 September 1970, New Bern police officers conducted a warrantless search of Shirley Mae Carr's apartment and recovered a M-14 rifle which had been partly disassembled. They also recovered a supply of 7.62 millimeter ammunition.

Evidence for defendant Nickerson tended to show that his part in the plan to rob a filling station was to act as a lookout. The other three defendants were to accomplish the actual robbery. Defendant Ferguson supplied the M-14 rifle and the ammunition. The defendant Lancaster took the rifle to the scene and ran from the scene with it after the shots were fired. Defendant Nickerson grabbed the rifle out of defendant Lancaster's hand as they were running from the scene. Defendant Nickerson carried the rifle to a point where he hid it in some bushes. Two or three days later he took it to Shirley Mae Carr's apartment where he partly disassembled it. He placed it in Shirley Mae Carr's apartment for safekeeping until he could return it to defendant Ferguson.

The jury returned a verdict of guilty of murder in the second degree and judgment of confinement for a term of thirty years was entered. Defendant appealed.

*Attorney General Morgan, by Assistant Attorney General Satsky, for the State.*

*Robert G. Bowers for the defendant.*

BROCK, Judge.

At trial defendant was represented by privately employed counsel from Chicago, Illinois, and privately employed counsel from New Bern, North Carolina. After the trial, upon petition alleging that defendant's resources had been exhausted, the trial judge allowed privately employed counsel to withdraw and appointed present counsel to perfect this appeal. It is a much sounder practice to require trial counsel to perfect an appeal; trial counsel is in position to know and to answer pertinent questions about what transpired at trial.

Presumably privately employed counsel negotiated a contract for adequate compensation to represent defendant on trial.

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State v. Nickerson

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It does not seem equitable to allow adequately compensated trial counsel to withdraw after they have exhausted defendant's resources and to cast the burden of court appointment upon new counsel. Conduct in this regard by out-of-state counsel is controllable under G.S. 84-4.1(3) as an initial condition upon which he is allowed to appear for trial.

Defendant assigns as error that the trial judge refused to suppress the evidence obtained in the warrantless search of Shirley Mae Carr's apartment. Before the trial started defendant filed a motion to suppress the evidence obtained by the search and an evidentiary hearing was conducted on his motion.

The evidence on the motion to suppress tended to show the following. The New Bern police officers had searched for three days for a high powered rifle in an area of seven to nine blocks of Darnell's Gulf Station. They had searched for it in storm drains, under houses, and in other places. They had checked the neighborhood from door to door and talked to people up and down the streets in an effort to find someone who had knowledge of the location of a high powered rifle. On 30 September 1970 Captain Bratcher, the Captain of Detectives in New Bern, received a call from Officer Rodgers advising that he had information that there was a high powered rifle in Shirley Mae Carr's apartment at 0-135 Craven Terrace. This apartment was approximately seven blocks from Darnell's Gulf Station. Captain Bratcher knew Shirley Mae Carr and knew that she had a police record. Taking several other officers with him, Captain Bratcher went to Shirley Mae Carr's apartment and conducted a search without a search warrant and without anyone's consent. Shirley Mae Carr was not present but the door to the apartment was unlocked and the officers went in; she returned to the apartment before the officers left, but after they had completed the search. A M-14 rifle and ammunition was found in her bedroom on the second floor. At the time of the search defendant Nickerson had not been taken into custody, and he was not known to Captain Bratcher.

The evidence further tended to show that Shirley Mae Carr was acquainted with defendant Nickerson and that she had known him about two or three months. She testified that defendant Nickerson had stayed overnight in her apartment approximately three or four nights a week, and she had told him he

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State v. Nickerson

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could use her apartment and make himself at home whenever he pleased. There were times when defendant gave her money for her household things. She testified that defendant came to her apartment on 29 September 1970, saying that he wanted to leave something upstairs, and then he left. She testified that she rented the apartment from the government and that as long as she paid the rent she could allow anyone she wished to stay there. She further testified that she paid the rent and that defendant did not pay the rent.

At the conclusion of the hearing, the trial judge ruled that defendant Nickerson had no standing to object to the illegal search of Shirley Mae Carr's apartment, and denied defendant's motion to suppress.

We hold that the trial judge was correct in denying defendant's motion to suppress for lack of "standing" to object to the introduction of evidence on the ground that it was obtained by a search and seizure in violation of the Fourth Amendment.

Although there is some question whether the Federal requirements relating to "standing" have been specifically made applicable to the State (*Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L. Ed. 2d 797), we find that the defendant had no "standing" to object under either the Federal or State requirements. See *Jones v. U.S.*, 362 U.S. 257, 80 S.Ct. 725, 4 L. Ed. 2d 697; *State v. Ray*, 274 N.C. 556, 164 S.E. 2d 457. Defendant is not one "aggrieved by an unlawful search and seizure," because he does not belong to the class for whose sake the constitutional protection is given. Defendant Nickerson was not a victim of a search and seizure, one against whom the search was directed. The search and seizure was directed to the rifle in Shirley Mae Carr's residence. Thus, defendant comes within the class who can only claim prejudice through the use of evidence gathered as a consequence of a search or seizure directed to someone else. This class is not one for whose sake the constitutional protection is given. Upon the facts of this case, Nickerson, himself, was not the victim of an invasion of privacy and had no "standing" to object to the introduction of the evidence.

The defendant's assignment of error No. 2 that the trial court erred in refusing to grant the defendant's motion for acquittal and assignment of error No. 3 that the trial court erred

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in refusing to grant the defendant's motion for mistrial are both based and related to the motion to suppress the evidence. Assignments of error No. 2 and No. 3 are without merit and are overruled.

In our opinion defendant had a fair trial, free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

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TOMMIE B. LANCASTER v. CHARLES R. SMITH

No. 715DC506

(Filed 15 December 1971)

1. Appeal and Error § 41— statement of evidence on appeal

Appeal is subject to dismissal by the Court of Appeals in its discretion where the evidence is presented in the record in question and answer form. Court of Appeals Rule 19(d).

2. Appeal and Error § 24— form of assignments of error

An assignment of error which attempts to present several propositions of law is broadside and ineffective.

3. Appeal and Error § 24— form of assignments of error

An assignment of error must disclose the questions attempted to be presented without going beyond the assignment itself.

4. Limitation of Actions § 4— action to recover interest paid — dismissal with prejudice

The trial court did not err in dismissing with prejudice plaintiff's action instituted in January 1970 to recover interest allegedly paid under protest to defendants in 1963.

APPEAL by plaintiff from *Barefoot, District Judge*, 22 March 1971 Session of District Court held in NEW HANOVER County.

On 3 April 1963, the defendant, Charles R. Smith, and his wife, Doris L. Smith, and one Raymond J. Gurley (owners and lessors) entered into a written contract with plaintiff, Tommie B. Lancaster, whereby Lancaster was to lease certain described lands located in the Town of Kure Beach with option to pur-

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Lancaster v. Smith

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chase. Under the terms of the contract, the plaintiff was to have possession of the property as tenant until 1 January 1964 for a rental of \$4,000, and was given an option, to be exercised prior to 1 January 1964, to purchase the property for \$35,000. If plaintiff exercised the option to purchase, the amount paid as rental was to be credited on the purchase price, which was to be paid as follows:

“\$4,000.00 per year commencing on January 15, 1964, and \$4,000.00 per year thereafter until the remaining purchase price has been paid in full, with interest on unpaid balances, due and owing from year to year at 6% per annum payable annually with the principal payment, the final installment to be in such sum as shall be then due if less than \$4,000.00.

. . . (T)he Deed of Trust which party of the second part will execute in favor of the parties of the first part will be in such amount as will reflect the proper outstanding balance due upon the purchase price after credit for rentals has been made. \* \* \* ”

Plaintiff elected to exercise his option; however, in December 1963, a dispute arose as to whether interest in the amount of \$1,860 for the year 1963, was due the owners. Plaintiff contended that no interest was due; but the owners refused to deliver a deed for the premises unless the interest was paid. Plaintiff alleged that in order to obtain a deed for the property, he paid defendant Smith and Gurley the sum of \$9,860 (which included the \$1,860. in controversy) on 30 December 1963, and gave to them the note and deed of trust in the amount of \$23,000 to secure the balance of the purchase price. In November 1968, plaintiff was prepared to pay the balance due on the note given for the remainder of the purchase price, less the amount of \$1,860. Defendant refused to accept the offer.

In February 1969, the parties agreed that the plaintiff would pay to the defendant \$9,800, which plaintiff contended was the balance due on the note, and that the disputed amount of \$1,860 would be placed in escrow pending settlement or suit. Plaintiff made the agreed-upon payments and instituted this action on 16 January 1970 to recover of defendant the amount of \$1,860, with interest from 30 December 1963, which he alleges he paid under protest to the defendant and Gurley on

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30 December 1963. The defendant in his answer denied owing the plaintiff any amount and as a further defense pleaded the three-year statute of limitations.

After a hearing in the district court, the following judgment was entered:

"This cause coming on to be heard and being heard . . . and counsel for both the plaintiff and the defendant, in open court, having waived a trial by jury and having agreed that the Court might find the facts thereon and enter such Judgment as the facts and law justify, and the Court having heard the parties, at the close of plaintiff's evidence, the defendant moved to dismiss the action for the following reasons:

1st: That the plaintiff had paid the said sum of Eighteen Hundred and Sixty (\$1,860.00) Dollars, being the sum in dispute, with full knowledge of all the facts; and

2nd: That the claim upon which the plaintiff has sued was barred by the three year Statute of Limitations;

And the Court having taken this Motion under advisement until the conclusion of testimony of both sides, at which time the defendant renewed his Motion to dismiss the action.

Upon the foregoing the Court finds as a fact:

1. That as a result of an agreement to sell and purchase certain real property located at Kure Beach, New Hanover County, North Carolina, plaintiff, as a part of their agreement, paid to the defendant the sum of Eighteen Hundred and Sixty (\$1,860.00) Dollars, which defendant demanded as interest for the year 1963 on the purchase price, after an allowance of Four Thousand (\$4,000.00) Dollars; that at this time plaintiff and the defendant were present with their attorneys.

2. That thereafter, on February 10th, 1969, plaintiff proposed to make the final payment of his Note and Deed of Trust due the defendant on said sale and demanded that the defendant give him credit for the interest payment he had paid on December 30th, 1963.

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3. That the defendant refused said demand, but did agree to hold out from said settlement the said sum of Eighteen Hundred and Sixty (\$1,860.00) Dollars and place it in escrow until plaintiff could litigate the matter.

4. That plaintiff brought suit against the defendant on the 16th day of January, 1970, to recover of him the sum of Eighteen Hundred and Sixty (\$1,860.00) Dollars he had paid him for interest for the year 1963.

CONCLUSIONS OF LAW

The Court concludes upon the foregoing facts:

(a) That the payment of the sum of Eighteen Hundred and Sixty (\$1,860.00) Dollars, made by the plaintiff to the defendant was voluntarily made, with full knowledge by the plaintiff of all the facts and therefore was not recoverable.

(b) That the plaintiff's cause of action, if any he had, accrued (sic) December 30th, 1963, and that the claim was barred by the three year Statute of Limitations when he instituted suit on January 16th, 1970.

(c) That the defendant timely plead the three year Statute of Limitations.

WHEREFORE, the Court grants defendant's Motion to dismiss plaintiff's action, and the same is hereby

ORDERED

Dismissed with prejudice and ORDERED stricken from the docket. Let the plaintiff pay the costs of this action, to be taxed by the Clerk."

The plaintiff appealed to the Court of Appeals.

*Dees, Dees, Smith & Powell by William A. Dees, Jr., and William Powell for plaintiff appellant.*

*Goldberg & Anderson by Aaron Goldberg for defendant appellee.*

MALLARD, Chief Judge.

[1] In the record on appeal, the evidence is presented in question and answer form. This is in violation of Rule 19(d) of

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the Rules of Practice in the Court of Appeals which requires that the evidence shall be in narrative form, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. This rule further provides that the court, in its discretion, may hear the appeal, dismiss it, or remand it for a settlement of the case on appeal to conform to the rule. *State v. Thigpen*, 10 N.C. App. 88, 178 S.E. 2d 6 (1970).

Furthermore, the only assignment of error in the record on appeal is stated as follows:

“The plaintiff assigns as error the Court’s findings of fact and conclusions of law as set forth in his Exceptions Number 2 through 5, R pp 9 & 10 and for entry of the judgment against him set out by Exception 1, R p 11.”

[2, 3] This assignment attempts to present different propositions of law in one assignment of error, and is broadside and ineffective. *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970); *Hines v. Frink and Frink v. Hines*, 257 N.C. 723, 127 S.E. 2d 509 (1962); *Hicks v. Russell*, 256 N.C. 34, 123 S.E. 2d 214 (1961); *Wells v. Insurance Co.*, 10 N.C. App. 584, 179 S.E. 2d 806 (1971). This assignment of error does not comply with the Rules of Practice in the Court of Appeals in that it does not show the question sought to be presented without referring to the record. The assignment of error must disclose the questions attempted to be presented without going beyond the assignment itself. See *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970). The Rules of Practice in the Court of Appeals relating to assignments of error are substantially similar to the Rules of Practice in the Supreme Court of North Carolina. In the case of *Lewis v. Parker*, 268 N.C. 436, 150 S.E. 2d 729 (1966), it is said:

“ \* \* \* We have repeatedly said that these rules require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. \* \* \* ”

See also *Gilbert v. Moore*, 268 N.C. 679, 151 S.E. 2d 577 (1966); *State v. Oliver*, 268 N.C. 280, 150 S.E. 2d 445 (1966); *Long v.*

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*Honeycutt*, 268 N.C. 33, 149 S.E. 2d 579 (1966); *Nationwide Homes v. Trust Co.*, 267 N.C. 528, 148 S.E. 2d 693 (1966); *Hunt v. Davis*, 248 N.C. 69, 102 S.E. 2d 405 (1958).

[4] However, we do not dismiss the appeal for failing to narrate the evidence. We treat the appeal itself as an exception to the judgment. *Barnette v. Woody*, 242 N.C. 424, 88 S.E. 2d 223 (1955). The question presented is whether the trial judge committed error in dismissing plaintiff's action with prejudice, and we hold that he did not. The judgment of the district court is affirmed.

Affirmed.

Judges HEDRICK and GRAHAM concur.

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STATE OF NORTH CAROLINA v. JOHNNY CARL BLAYLOCK

No. 7110SC736

(Filed 15 December 1971)

**1. Criminal Law § 104— motion for nonsuit — consideration of evidence**

In determining whether evidence is sufficient to be submitted to the jury in a criminal case, the evidence must be considered in the light most favorable to the State and the State must be given every reasonable inference to be drawn therefrom.

**2. Narcotics § 4— possession of heroin — constructive possession by defendant — sufficiency of evidence**

In a prosecution charging defendant with the possession of heroin, the State's evidence was sufficient to support a jury finding that the defendant was in the constructive possession of heroin found in the apartment of another, especially where there was evidence (1) that the defendant voluntarily identified himself to police officers as the person in charge of the apartment, (2) that the defendant produced a key to the room where the heroin was found, and (3) that defendant stated that he kept his paint and tools in the room.

**3. Searches and Seizures § 3— search warrant for heroin — sufficiency of affidavit**

Affidavit was sufficient to support the issuance of a search warrant for heroin allegedly located in a certain apartment.

APPEAL by defendant from *Godwin*, *Special Judge*, 4 May 1971 Special Session of Superior Court held in WAKE County.

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Defendant was charged in a bill of indictment, proper in form, with possessing a narcotic drug, heroin. He entered a plea of not guilty.

The State offered evidence tending to show the following: On 31 October 1970, several Raleigh police officers went to the apartment of Shirley King at 508½ E. Hargett Street in Raleigh for the purpose of conducting a search under the authority of a search warrant issued that date. Miss King was not at her apartment but defendant and approximately seven other persons were there. The search warrant was read to defendant after defendant stated to the officers that he was in charge of the apartment. Drops of blood which were still wet were found in the bathroom. A hypodermic needle was found in a glass of water in a cabinet under the kitchen sink and various needle covers were found about the kitchen. The door to a back room was locked. Defendant stated "That is where I keep my paint and tools" and unlocked the door with a key he took from his pocket. A package containing heroin was found under the lining of a chair in the room and a plastic banana was found in the room closet. A hypodermic needle, syringe and plunger were inside the plastic banana.

In the opinion of at least one of the officers, defendant was under the influence of heroin.

Defendant did not testify or offer other evidence.

The jury returned a verdict of guilty and the court entered judgment imposing an active prison sentence of five years.

*Attorney General Morgan by Associate Attorney Boylan for the State.*

*William T. McCuiston for defendant appellant.*

GRAHAM, Judge.

Defendant has expressly abandoned several assignments of error. His remaining assignments of error raise three questions: (1) Was the evidence sufficient to be submitted to the jury? (2) Was the affidavit upon which the search warrant was based sufficient? (3) Did the court correctly and adequately charge the jury on constructive possession? We answer all three questions in the affirmative.

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[1] (1) It is elementary that in determining whether evidence is sufficient to be submitted to the jury in a criminal case, the evidence must be considered in the light most favorable to the State and the State must be given every reasonable inference to be drawn therefrom. *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634.

In the case of *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49, evidence presented against one of three defendants charged with unlawful possession of barbiturates was strikingly similar to evidence offered against the defendant in this case. There, the court summarized the challenged evidence as follows:

"Joyce Furr was not named in the search warrant. No barbiturates were ever found on her person. She was present, however, at 1009 E. 18th Street when the premises were searched. She was in the bathroom where several barbiturate capsules were found under the lavatory and one under the tub. Barbiturates were found elsewhere in the house. She was unsteady on her feet, had glassy, dilated eyes, mumbling unintelligibly, and seemed to be in a stupor. There was no odor of alcohol about her. She was apparently under the influence of drugs."

[2] The Supreme Court held that this evidence against Joyce Furr was sufficient to be submitted to the jury. The evidence in the instant case is even more favorable to the State. When the officers entered the apartment in question, defendant voluntarily stepped forward and identified himself as the person in charge of the apartment. He produced a key to the room where the heroin was found and stated that it was the room where he kept his paint and tools. In the opinion of one of the officers, defendant was under the influence of heroin. Evidence of the unlawful use of drugs was found in various places throughout the apartment. In our opinion, this evidence was sufficient to support a finding by the jury that defendant was in the constructive possession of the heroin found in the apartment.

[3] (2) The affidavit upon which the search warrant is based was sworn to by E. D. Whitley, a detective of the Raleigh Police Department. It alleges that Whitley had probable cause to believe that heroin and marijuana were located on the premises of Shirley King at 508½ Hargett Street on 31 October 1970.

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The premises and location thereof are specifically described in the affidavit. The affidavit continues:

"The facts which established probable cause for the issuance of a search warrant are as follows: A reliable informer stated to me on this date that Shirley King has in her possession at this time drugs in her house and on her person. He further stated that he saw it and that he saw it being sold to a c/m who he did not know. He stated that she sold the c/m heroin and that she also had marijuana that she was selling. This person has given me other information in the past two years that has proven to be correct and lead to the arrest of several persons for narcotic violations. On at least 5 occasions, I have also received from other persons the information that Shirley King is selling heroin and marijuana at 508½ E. Hargett St. This house has been observed by me on several occasions prior to this date and I have seen known drug users going to this house and these persons use heroin. Shirley King is known to other members of the Raleigh Police Dept. Vice Squad as a person that deals in the sale of drugs. Barry Chavis a known heroin user goes to this house and Chavis was arrested 10-29-70 for Illegal possession of heroin by me and other officers."

Defendant makes three specific complaints about the affidavit. First, he says that it contains no affirmative allegation that affiant or informer spoke with personal knowledge of the matters complained of therein. This is without merit, for the affidavit specifically states that the informer saw heroin and marijuana being sold at the premises to be searched.

Secondly, defendant says that the affidavit contains no allegation that he had been observed with drugs on his person or in his possession. This is immaterial. The warrant authorized the search of the premises of one Shirley King. It did not authorize the search of defendant personally or of defendant's premises. Defendant does not contend that the apartment at 508½ E. Hargett Street was his home.

Defendant's final contention with respect to the affidavit is that it fails to set out the date and time when the informer saw the heroin and marijuana in the apartment. The affidavit states that the informer stated to affiant "on this date that

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Shirley King has in her possession *at this time* drugs in her house. . . ." (Emphasis added.) Then follows the reason the informer knew the unlawful drugs were present *at that time*; to wit, he saw them being sold. Taking the two statements together, a legitimate inference arises that the informer made his observation on the date the affidavit was made, or at least at some time so recent as to give him good cause to believe that unlawful drugs were still present on the premises to be searched on the date the affidavit was made. Under these circumstances, we hold that an allegation in the affidavit as to the specific date on which the affiant made his observation was not essential.

(3) With respect to the final question raised by defendant, suffice to say we have examined the charge given by the trial judge and have found his instructions as to possession to adequately include a correct definition of constructive possession.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. ALBERT HUMPHREY

No. 713SC608

(Filed 15 December 1971)

**1. Criminal Law § 46— evidence of flight — hearsay testimony — harmless error**

The admission of hearsay testimony relating to defendant's plans for flight, although erroneous, was not prejudicial to defendant in this robbery prosecution, where there was the subsequent admission of similar testimony without objection.

**2. Criminal Law § 73— hearsay testimony**

Evidence is hearsay when its probative force depends in whole or in part on the competency and credibility of some person other than the witness from whom the information is sought.

**3. Criminal Law § 36.1— alibi — instructions**

Although trial court's instructions on alibi failed to charge the jury to consider the evidence of alibi together with all other evidence in the case, the charge, when taken as a whole, sufficiently instructed the jury that their verdict should be based on all the evidence.

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APPEAL by defendant from *Rouse, Judge*, May 14, 1971 Session of CRAVEN Superior Court.

Defendant was charged in a bill of indictment with common law robbery.

The State introduced evidence tending to show that the defendant met Ark Smith for the first time in the Moonlight Inn Club in New Bern. The two remained there about an hour and then left to attend a party at a place referred to as the Center. They were joined by two other men as they left the Moonlight Inn; and upon arriving at the Center, they found the party to be over and the area deserted. The three men then knocked Ark Smith to the ground striking him several times and the defendant took Ark Smith's wallet and watch and ran. The defendant was arrested three days later.

The defendant introduced evidence tending to show that he met Ark Smith at the Moonlight Inn at around 10:00 p.m. on March 21, 1971; that Ark Smith was "high"; that the two of them had several drinks there and at the Rib House; that the defendant left Ark Smith and went alone back to the Moonlight Inn and then to a place known as Lindberg's arriving at approximately 11:00 or 11:15 p.m. and that he had not seen Ark Smith again that evening after leaving the Rib House.

At the trial Ark Smith was permitted to testify, over defendant's objections, that the police officers investigating the alleged offense told him, "they would go over there and try to identify him by the clothes he was wearing and try to stop him at the airport."

The trial court charged the jury on the effect of evidence of flight.

The trial court gave the following charge on the issue of alibi:

"Now the Court charges you that the defendant contends that he was at some other place at the time that the alleged robbery was to have taken place. This is known as an alibi. The word 'alibi' simply means somewhere else. The burden of proving an alibi does not rest upon the defendant. To establish the defendant's guilt, the State must prove beyond a reasonable doubt that the defendant was

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present at, and participated in, the crime charged. The defendant's contention that he was not present and did not participate is simply a denial of facts essential to the State's case. Therefore, I charge you that if, upon considering the evidence with respect to the alibi, you have a reasonable doubt of the defendant's presence there or participation in the crime charged, you must find him not guilty."

The jury returned a verdict of guilty and judgment was entered imposing a prison sentence.

From the verdict and judgment, defendant appeals.

*Attorney General Robert Morgan by Assistant Attorney General William W. Melvin and Associate Attorney Louis W. Payne, Jr., for the State.*

*David S. Henderson for defendant appellant.*

CAMPBELL, Judge.

The defendant raises two questions on appeal:

1. Whether the trial court committed prejudicial error in allowing the State's witness to give hearsay evidence of flight and in instructing the jury on the consideration of evidence of flight.

2. Whether the court's instructions to the jury on the principles of alibi were proper.

[1] Over objection by defendant, the trial court allowed the State's witness, Ark Smith, to testify that police officers told him they would "... try to stop him [defendant] at the airport." The defendant contends that this testimony was hearsay and therefore inadmissible, and that this testimony was made prejudicial to the defendant when the judge instructed the jury that it could consider evidence of flight, together with other facts, in determining whether the combined circumstances amounted to an admission or consciousness of guilt.

[1, 2] Evidence is hearsay when its probative force depends in whole or in part on the competency and credibility of some person other than the witness from whom the information is sought. It is incompetent to establish any specific fact susceptible of being proved by witnesses who speak from their own

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knowledge. *State v. Khuttz*, 206 N.C. 726, 175 S.E. 81 (1934). We agree with defendant that the testimony in this case is hearsay and should have been excluded from evidence. There was, however, ample evidence of flight admitted without objection by defendant. There was testimony that defendant had told Smith he was going back to New York and was going to catch a 1:00 o'clock plane. Smith told this to the police. There was also evidence that defendant ran after taking Smith's watch and that all three of the men ran off together after robbing Smith. Conceding that it was error to admit the evidence objected to by defendant, there is still ample evidence of flight to be considered by the jury. The error in the admission of testimony was rendered harmless by the later admission of substantially similar testimony without objection. *State v. Gordon*, 224 N.C. 304, 30 S.E. 2d 43 (1944). The charge to the jury on consideration of the evidence of flight was based on ample evidence in addition to that objected to by defendant. We find no reversible error in the admission of the challenged testimony or in the charge to the jury on the issue of flight.

[3] The defendant also assigns as error the trial court's charge to the jury on alibi. The defendant contends that it was error for the trial court to instruct, "that if, upon considering the evidence with respect to the alibi, you have a reasonable doubt of the defendant's presence there or participation in the crime charged, you must find him not guilty." It is argued that this instruction limited the jury's consideration of evidence of alibi and required the jury to consider it independently of other evidence and that a proper instruction would charge the jury to consider the evidence of alibi together with all the other evidence.

We agree that a better instruction would state to the jury, explicitly, that the evidence of alibi should be considered with all the other evidence. In *State v. Bridgers*, 233 N.C. 577, 64 S.E. 2d 867 (1951), the North Carolina Supreme Court suggested the proper form for a charge on alibi:

"Therefore, the defendant's evidence of alibi is to be considered by you like any other evidence tending to refute or disprove the evidence of the State. And if upon consideration of all the evidence in the case, including the defendant's evidence in respect to alibi, there arises in your minds

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a reasonable doubt as to the defendant's guilt, he should be acquitted.' "

We do not, however, agree with the defendant that the charge in this case is reversible error. The charge to the jury must be considered as a whole, in the same connected way as given to the jury with the presumption that the jury did not overlook any portion of it and if, when so construed, it presents the law fairly and correctly, there is no ground for reversal, although some of the expressions, when standing alone, may be regarded as erroneous. *State v. Hairston*, 222 N.C. 455, 23 S.E. 2d 885 (1942) (citing cases). In examining the charge in the case before us, we find that the trial judge instructed the jury, in numerous instances, that they should consider "all the evidence" or "the evidence" (unqualified). We are of the opinion that in so doing the trial judge sufficiently emphasized to the jury that their verdict should be based on all the evidence. It is to be noted that the charge was correct in the essentials that alibi is not an affirmative defense and that the burden is not on the defendant to prove the alibi but that the burden is on the State to prove the defendant's presence at and participation in the crime charged in the indictment. We conclude that, although the charge on alibi was not perfect, when considered with the remainder of the charge it presented a fair and accurate statement of the law and was not reversible error.

We commend the instruction quoted from *State v. Bridgers*, *supra*, to the attention of trial judges for instructions on alibi.

In the entire trial we find,

No error.

Judges MORRIS and PARKER concur.

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**State v. Farris**

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**STATE OF NORTH CAROLINA v. WILLIAM EARL FARRIS**

No. 712SC737

(Filed 15 December 1971)

**1. Constitutional Law § 30— speedy trial — 47-day delay between offense and arrest**

A delay of 47 days from the date of the alleged offense to the issuance of the warrant for defendant's arrest does not violate defendant's right to a speedy trial.

**2. Criminal Law § 89— impeachment of witness — identification of defendant — arrest of innocent person**

Where the State's witness made positive visual identification of defendant during the trial, it was proper for the trial court to prohibit defendant from cross-examining the witness with respect to the issuance of a warrant for the arrest of an innocent person during the course of the same investigation which led to the present charge against defendant.

**3. Criminal Law § 130— juror's unauthorized view of crime scene — harmless error**

In a prosecution for the sale of heroin, the fact that, during an overnight recess after the jury had begun deliberating, a juror rode by the house in which the alleged sale was made, *held* not to warrant a new trial.

**APPEAL** by defendant from *Rouse, Judge*, 24 May 1971 Session of BEAUFORT Superior Court.

Defendant was tried and convicted on a bill of indictment alleging the unlawful sale of heroin, a narcotic drug, to an undercover SBI agent.

Pertinent evidence of the State tended to show: On or about 27 January 1971 SBI Agent William H. Thompson, acting as an undercover agent, went to the home of defendant at 820 Callis Avenue in Washington, North Carolina, and there purchased twenty-three bindles of a white powdery substance for the sum of \$90.00. Later chemical analysis on two of the bindles revealed they contained the narcotic drug heroin. The warrant for defendant's arrest was issued on 15 March 1971.

Defendant denied that Agent Thompson had ever been to his home or purchased anything from him. From judgment imposing prison sentence of three to five years, defendant appealed.

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State v. Farris

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*Attorney General Robert Morgan and Associate Attorney Benjamin Hunt Baxter, Jr., for the State.*

*Paul and Keenan by James E. Keenan for defendant appellant.*

BRITT, Judge.

[1] Defendant assigns as error the denial of his motion to quash or dismiss the indictment on the ground that he had been denied his right to a speedy trial. Defendant contends that the delay of some 47 days from the date of the alleged offense, 27 January 1971, to the issuance of the warrant on 15 March 1971, was highly prejudicial to him.

We find no merit in this assignment of error. Our Supreme Court in an opinion by Sharp, Justice, said in *State v. Johnson*, 275 N.C. 264, 277, 167 S.E. 2d 274, 283 (1969): "We here hold that when there has been an atypical delay in issuing a warrant or in securing an indictment and the defendant shows (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State; and (2) that the length of the delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed."

In *Johnson*, there was a *purposeful* four years delay. That is to be distinguished from a delay of 47 days where there was no oppressive delay on the part of the State but the time lapse was necessary to promote responsible police investigation involving an undercover operation in the local area. The court went on to say in *Johnson, supra*, at page 273: "Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort. *Pollard v. United States*, 352 U.S. 354, 1 L. Ed. 2d 393, 77 S.Ct. 481 (1957). Obviously, the authorities should not bring formal charges against a suspect until they have probable cause to believe they can prove him guilty; and—in a proper case—a reasonable delay may be justified to protect and to promote further responsible police investigation."

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We hold that the delay of 47 days under the facts of this case was not unreasonable and did not constitute a denial of a speedy trial.

[2] Defendant's second assignment of error relates to the sustaining of objections of the State which prohibited defendant from cross-examining a State's witness or from introducing evidence about a warrant issued for an innocent person during the course of the same investigation that led to the present charge against defendant. Defendant sought to impeach a State's witness on a mistaken identification of a person by a name supplied by independent third party sources in another instance in the undercover enforcement program. In the instant case the witness made positive visual identification of defendant at the trial, thus negating any chance that the independent sources had supplied the wrong name. In *State v. Hunsucker*, 3 N.C. App. 281, 285, 164 S.E. 2d 507, 510 (1968) where cross-examination of a State's witness concerning his failure to recognize a second robber was not permitted this court stated: "The testimony sought to be elicited by this examination was immaterial upon the question of the witness's ability to recognize this defendant, and its exclusion cannot, therefore, be held to be error." Thus, in this case since the evidence sought to be admitted was irrelevant it was properly excluded as not bearing on the issues involved. *Corum v. Comer*, 256 N.C. 252, 123 S.E. 2d 473 (1962).

[3] Defendant's last assignment of error is to the denying of defendant's motion for a new trial based on the viewing of the place of the alleged sale of narcotic drugs by one of the jurors during an overnight recess after the jury had begun deliberating but before the return of the verdict. The juror involved never identified the house in question, but did ride by it on the street on which the house was located.

The legal principles applied to juror misconduct are well summarized in *State v. Sneeden*, 274 N.C. 498, 504, 164 S.E. 2d 190, 194 (1968):

"Motions for a mistrial or a new trial based on misconduct affecting the jury are addressed to the discretion of the trial court. *In re Will of Hall*, 252 N.C. 70, 113 S.E. 2d 1. Unless its rulings thereon are clearly erroneous or amount to a manifest abuse of discretion, they will not be

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disturbed. *Stone v. Baking Co.*, 257 N.C. 103, 125 S.E. 2d 363; *O'Berry v. Perry*, 266 N.C. 77, 145 S.E. 2d 321; *Keener v. Beal*, 246 N.C. 247, 98 S.E. 2d 19. 'The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge.' *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279."

In 24 C.J.S., Criminal Law, § 1449 (14), p. 136, we find: "View. While the taking of an unauthorized view has been held to constitute grounds for a new trial, generally, the mere fact that the jury made an unauthorized visit to the place of the crime is not ground for a new trial, where they were not guilty of any misconduct while there and could not have acquired any improper information that might have influenced their verdict; and this presents a question largely for the determination of the trial court, in the exercise of a sound discretion." In *State v. Boggan*, 133 N.C. 761, 46 S.E. 111 (1903), the mere viewing of the scene of the crime was held not to be receiving evidence other than that offered at trial.

In light of the authorities cited above, we hold that the question of juror misconduct was within the sound discretion of the trial judge and there has been no showing of an abuse of that discretion.

Having found no merit to any of defendant's assignments or error, they are all overruled.

No error.

Judges BROCK and VAUGHN concur.

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STATE OF NORTH CAROLINA v. WILLIAM WALTER CRAWFORD

No. 717SC494

(Filed 15 December 1971)

1. Burglary and Unlawful Breakings § 5— breaking and entering — sufficiency of evidence

The State's evidence was sufficient for the jury in this prosecution for felonious breaking and entering where it tended to show that the rear door of a store had been opened at 4:00 a.m., that the store's

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burglar alarm was activated, that cartons of cigarettes were removed from the shelves and placed in large containers, that defendant was observed about 20 steps from the store in a field within minutes after the burglar alarm sounded, that he was armed with a pistol, and that he attempted to hide and feigned injury when detected.

**2. Criminal Law §§ 9, 113— failure to instruct on aiding and abetting**

The trial court did not err in failing to instruct the jury on the principles of aiding and abetting in this prosecution for felonious breaking and entering where the State proceeded on the theory that defendant was the sole perpetrator of the offense and there was no evidence that anyone other than defendant was involved in the crime.

APPEAL by defendant from *Martin, Special Judge, (Robert M.)*, January 4, 1971 Session of the Superior Court of WILSON County.

The defendant was charged in a bill of indictment with felonious breaking and entering. At trial the defendant entered a plea of not guilty. At the close of the State's evidence, the defendant moved for judgment as of nonsuit. The motion was denied. The defendant offered no evidence. The jury returned a verdict of guilty as charged in the bill of indictment.

From this verdict, the defendant appeals assigning as error the denial of his motion for judgment as of nonsuit and the failure of the trial court to instruct the jury on the principles of aiding and abetting.

The facts are set forth in the opinion.

*Attorney General Robert Morgan by Associate Attorney Ronald M. Price for the State.*

*Herbert B. Hulse and George F. Taylor for defendant appellant.*

CAMPBELL, Judge.

The evidence for the State tended to show the following:

Mr. Leslie Raper is the owner of a store located on U.S. Highway 301, a mile and a half north of Kenly, North Carolina. A burglar alarm was in operation at the store. It was designed so that if activated, it would sound an alarm in Mr. Raper's bedroom, but no alarm would be sounded in the store. Mr.

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Raper's home was on the same property as the store. The house and the store were separated by a lot in which were parked several used cars.

On August 28, 1970, Mr. Raper closed his store in the early evening. He placed a can against the back door as a noise-making device in case the door was opened.

At approximately 4:00 o'clock a.m., the alarm sounded in Mr. Raper's bedroom. He contacted the Sheriff's Department and dressed. He left the house and started toward the store walking behind his used car office. As he went toward the store he saw the defendant, about 20 steps away, take two steps across the tobacco field behind the store. At this time two deputies sheriff arrived and drove between the used car office and the store, and the lights of their automobile revealed the defendant. The defendant went down on his face in the field. The deputies ordered the defendant out of the field. The defendant threw away an object later found to be a .25 caliber pistol. The defendant called to the deputies that his leg was broken and he could not walk. The deputies again ordered the defendant out of the field, and he got up and walked to them. An investigation of the store revealed that the back door had been opened. A large number of cigarette cartons had been taken from the shelves and boxed up in large containers. An automobile belonging to defendant was found approximately 100 yards behind the store in some woods. Footprints leading from the automobile to the point in the field where defendant was first seen were observed by the deputies. They did not observe footprints from the field to the back of the store. No fingerprints were taken from the interior of the store. No property from the store was found on the defendant.

Mr. Raper testified it would take from five to eight minutes to load the ten or eleven cigarette containers found in the store. He testified that it was probably four to six minutes between the time the alarm sounded and the time he first observed the defendant. He did not see the defendant at any time moving away from the store. Mr. Raper testified that from his knowledge of the premises, someone could have left through the front door while he and the deputies were in the rear of the store apprehending the defendant. There was testimony that when the deputies entered the store they found the front door closed.

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Upon a motion for judgment as of nonsuit, all the evidence tending to sustain a conviction will be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965) (citing cases).

"It is a general rule in this jurisdiction that if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to a jury. . . ." *State v. Mabry*, 269 N.C. 293, 152 S.E. 2d 112 (1967).

When the motion for nonsuit challenges the sufficiency of circumstantial evidence, as in the case now before us, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to determine whether the facts establish defendant's guilt beyond a reasonable doubt. It is not necessary that the evidence exclude every reasonable hypothesis of innocence. *State v. Swann*, 272 N.C. 215, 158 S.E. 2d 80 (1967).

[1] Viewing the evidence in the light most favorable to the State, we find evidence that the rear door of Mr. Raper's store had been opened, the burglar alarm activated, and the contents of the shelves removed and placed in boxes without the permission of the owner. This establishes an unlawful breaking and entering. The evidence that ten or eleven boxes had been filled with cigarette cartons tends to establish the felonious intent to commit larceny. The evidence that defendant was observed about 20 steps from the store in an open field at an early hour within minutes after the burglar alarm sounded; that he was armed with a pistol; that he attempted to hide and then feigned injury when detected tends to establish that the defendant was the person who had entered Mr. Raper's store.

In applying the rules set forth above to the facts of this case, we find that there was sufficient evidence to go to the jury. The denial of defendant's motion for judgment as of nonsuit was proper.

[2] The defendant's second assignment of error is that the trial court erred in not instructing the jury on the principles of aiding and abetting. We do not agree.

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State v. Crawford

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“A person aids when, being present at the time and place, he does some act to render aid to the actual perpetration of the crime, though he takes no direct share in its commission, and an abettor is one who gives aid and comfort, or who either commands, advises, instigates or encourages another to commit a crime.’ . . .” *State v. Kelly*, 243 N.C. 177, 90 S.E. 2d 241 (1955).

By definition, an aider and abettor is one who assists another.

“One cannot aid and abet in the commission of a crime unless there is another who has committed the offense. In other words, one cannot be an aider and abettor of himself in the commission of an offense.” *Morgan v. U.S.*, 159 F. 2d 85 (10th Cir. 1947).

In the case before us there is no evidence that there was anyone other than defendant involved in the offense charged in this indictment. The defendant was indicted and tried as the sole and principal perpetrator of this offense. We agree with the rule in *State v. Madam (X)*, 2 N.C. App. 615, 163 S.E. 2d 540 (1968) that where the State proceeds on the theory of aiding and abetting and offers evidence to that effect, the trial court must instruct the jury on the principles of aiding and abetting. But where the State proceeds on the theory that the defendant is the principal and there is no evidence of aiding and abetting, it is not error to refuse to instruct the jury on the principles of aiding and abetting.

In the entire trial, we find no error.

Affirmed.

Judges MORRIS and PARKER concur.

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In re Wilson

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IN THE MATTER OF W. L. WILSON, ET UX., GLADYS B. WILSON,  
AS SURETY IN APPEARANCE BONDS, EX PARTE

No. 711DC738

(Filed 15 December 1971)

**1. Constitutional Law § 24— due process — notice and hearing**

Notice and hearing are essential to due process of law under the Fourteenth Amendment to the Constitution of the United States and Article I, § 19, of the State Constitution.

**2. Arrest and Bail § 11— revocation of license of bail bondsman**

A court of competent jurisdiction may revoke or suspend a license to engage in the bail bond business for due cause shown; however, procedural requirements of due process must be followed.

**3. Arrest and Bail § 11— revocation of bail bondsman's license — failure to give notice and hearing**

Order entered by the district court ex mero motu revoking the authority of appellants to engage in the bail bond business, without any notice to appellants and without their having opportunity to appear and be heard, is null and void.

**4. Arrest and Bail § 11; Clerks of Court § 1— Dare County — licensing of bail bondsman**

Clerk of court's certificate purporting to authorize the person named therein to execute bonds for criminal defendants in Dare County is null and void, since G.S. Ch. 85A, relating to bail bondsmen, is not applicable to Dare County, G.S. 85A-34, no other local or general statute gives the clerk of court of that county the authority to issue certificates to bondsmen, and the clerk has no inherent authority to authorize persons to engage in business as professional bondsmen.

APPEAL from *Horner, Chief District Judge*, 6 August 1971 Session of Criminal District Court held in DARE County.

On 6 August 1971 the Chief District Judge of the First Judicial District entered an order undertaking to revoke the purported authority of W. L. Wilson and wife, Gladys B. Wilson, to issue appearance bonds for defendants charged with crimes in the First Judicial District.

The court's order contains findings of fact which are summarized as follows:

(1) In a verified petition, dated 17 November 1970, W. L. Wilson petitioned the Clerk of Dare County Superior Court for the privilege of executing appearance bonds on behalf of defendants in criminal actions in that county.

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*In re Wilson*

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(2) The petition indicated that Wilson owned 52.8 acres of farm land in Hyde County, having a fair market value of \$10,000; that he had an equity in a 1970 automobile in the amount of \$600, and that he had personal property and cash assets of \$5,000. The petition also alleged that petitioner owned lands in Dare County by the entirety with his wife, Gladys B. Wilson, valued at \$32,500.

(3) Before and after the 18th of November, 1970, Wilson engaged in a professional bail bonding business throughout the First Judicial District, and particularly in the counties of Dare, Currituck, Camden and Pasquotank.

(4) Wilson has executed bonds totaling in excess of \$30,000 in Dare County in cases where the defendants have not yet appeared for trial. He has issued bonds in excess of \$5,500 in Currituck County on defendants whose cases are pending for trial.

(5) Wilson executes bonds in his own name without the joinder of his wife whose signature does not appear, except on some few bonds which she has co-signed.

(6) On 29 July 1971 Willis L. Wilson was charged in a warrant issued in Dare County with felonious assault with intent to commit rape. The case is pending hearing on probable cause in the District Court of Dare County. Willis L. Wilson was released from custody upon a \$5,000 bond posted by "W. L. Wilson Bonds."

(7) The court has received numerous complaints from law enforcement officers, defendants, and members of the Bar concerning the manner in which Wilson has and is conducting his bonding business in the First Judicial District.

(8) Wilson is not a fit and proper person to issue appearance bonds for the appearance of criminal defendants, either for himself or as the agent for any other party.

Based upon the foregoing findings of fact, the following order was entered:

"Now, THEREFORE, it is ORDERED, ADJUDGED and DECREED by this Court ex mero motu that the authority heretofore granted to W. L. Wilson and wife, Gladys B. Wilson, to issue appearance bonds in due form for any defendants

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In re Wilson

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charged in a crime in the First Judicial District be, and the same is hereby revoked, except that W. L. Wilson and wife, Gladys B. Wilson, shall remain liable for all criminal bonds executed by them on behalf of any criminal defendant prior to the entry of this order.

And it is further ORDERED that the Sheriff of Dare County serve a copy of this Order in person upon W. L. Wilson, and a copy upon Gladys B. Wilson, and that the Clerk of Court of Dare County forthwith furnish certified copy of this Order to the several Clerks of Court incorporated within the First Judicial District.

This the 6th day of August, 1971.

FENTRESS HORNER  
Chief District Judge"

W. L. Wilson and Gladys B. Wilson excepted to the order and appealed.

*Attorney General Morgan by Assistant Attorney General Melvin and Associate Attorney Payne for the State.*

*Forrest V. Dunstan and White, Hall & Mullen by Gerald F. White for defendant appellants.*

GRAHAM, Judge.

It is undisputed that the order appealed from was entered by the court *ex mero motu*, without any notice to appellants, and without their having opportunity to appear and be heard.

[1] "Notice and hearing are essential to due process of law under the Fourteenth Amendment to the Constitution of the United States, and Art. 1, § 17 [now Art. 1, § 19], of the state constitution. Accordingly, in order that there be a valid adjudication of a party's rights, the latter must be given notice of the action and an opportunity to assert his defense, and he must be a party to such proceeding." 2 Strong, N. C. Index 2d, Constitutional Law, § 24, pp. 232-233. (Citing cases.)

[2] A court of competent jurisdiction may revoke or suspend a license to engage in the bail bond business for due cause shown. 8 C.J.S., Bail, § 60(b), pp. 182-183. However, procedural requirements of due process must be followed. *State v. Parrish*, 254 N.C. 301, 118 S.E. 2d 786.

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Mull v. Mull

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[3] Procedural requirements of due process were not followed here and the court had no jurisdiction to enter the order. We therefore hold the order to be null and void.

[4] We further note, however, that the clerk's certificate, which purports to authorize Wilson to execute bonds for criminal defendants in Dare County, is also null and void. Chapter 85A of the General Statutes, entitled "Bail Bondsmen and Runners," is not applicable to Dare County. (G.S. 85A-34.) We find no local act of the General Assembly controlling the licensing or certification of "professional bondsmen" in Dare County; nor do we find any statute giving the clerk of court of that county authority to issue certificates to bondsmen, such as the certificate issued to Wilson on 18 November 1970. A clerk of court has no inherent authority to authorize persons to engage in business as professional bondsmen. (See *State v. Bowser*, 232 N.C. 414, 61 S.E. 2d 98, which discusses the general limitation of a clerk of court to accept bonds.)

Since the clerk of court of Dare County had no authority to issue the certificate, dated 18 November 1970, appellants received no rights under it.

For reasons stated the order appealed from is vacated.

Order vacated.

Chief Judge MALLARD and Judge HEDRICK concur.

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LUTHER PRESTON MULL v. MINNIE C. MULL

No. 7125DC648

(Filed 15 December 1971)

**1. Rules of Civil Procedure § 7— form of motions — necessity for rule numbers**

A motion must state the rule number or numbers under which the movant is proceeding. Rule 6 of the General Rules of Practice for the Superior and District Courts.

**2. Rules of Civil Procedure § 50— directed verdict — party having burden of proof**

The party having the burden of proof on all the issues was not entitled to a directed verdict. G.S. 1A-1, Rule 50.

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Mull v. Mull

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**3. Appeal and Error § 54— determination whether an order was discretionary**

Where an order setting aside a verdict does not show whether it was made in the exercise of discretion or as a matter of law, it will be considered to have been made in the exercise of discretion.

**4. Appeal and Error § 40— dismissal of appeal — failure to include verdict and judgment in record**

The Court of Appeals dismisses an appeal from the denial of plaintiff's motion for a directed verdict, since neither the verdict nor the judgment was included in the record on appeal.

APPEAL by plaintiff from *Evans, District Judge*, 17 May 1971 Session of District Court held in BURKE County.

Plaintiff filed complaint 6 February 1970 seeking an absolute divorce from defendant based upon an allegation that the parties had continuously lived separate and apart since 1965. In an answer filed 5 May 1970, defendant alleged abandonment in defense of plaintiff's action, and counterclaimed for temporary and permanent alimony. On 19 October 1970 plaintiff's action was dismissed upon his failure to appear and prosecute the action when called out in open court. No exception was taken to the order of dismissal.

Thereafter, defendant's action for alimony was tried by a jury. The first three of seven issues submitted to the jury were answered as follows:

“1A. Was Minnie C. Mull a resident of the State of North Carolina six months preceding this action?

ANSWER: Yes.

1. Were Luther Preston Mull and Minnie C. Mull married as alleged in the Cross Action?

ANSWER: Yes.

2. Was Luther Preston Mull the supporting spouse as alleged in the Cross Action?

ANSWER: No.”

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Mull v. Mull

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The record indicates that upon the return of the jury's verdict the following transpired:

"MOTION

MR. SIMPSON: If the Court pleases, we'll move that the Court, in its discretion, set aside the verdict of the jury as being contrary to the greater weight of the evidence and to direct a verdict for the plaintiff.

THE COURT: Gentlemen, let me see you in chambers a minute.

MR. SIMPSON: Also, disregarded by the jury the instructions of the Court and also insufficient of the evidence to justify the verdict; that the verdict is contrary to law in that the presumption on Issue No. 2 is that the burden of proof according to the statutory provisions is that the husband is the supporting spouse and no evidence was introduced by the defendant to rebut this presumption.

Order

THE COURT: The ruling on the plaintiff's motion to set the verdict aside, the motion is granted.

EXCEPTION No. 5"

Plaintiff purports to appeal from the court's order.

*John H. McMurray for plaintiff appellant.*

*Simpson and Martin by Wayne W. Martin for defendant appellee.*

GRAHAM, Judge.

Mr. Simpson represents defendant, but in his motion he asked that a verdict be directed for plaintiff. In ruling on the motion the court stated "the ruling on the plaintiff's motion to set the verdict aside, the motion is granted." This *lapsus linguae* on the part of defendant's counsel and the judge would undoubtedly have been corrected if a formal written order had been prepared and entered. However, no order appears in the record, other than the judge's statement that the motion to set aside the verdict is granted.

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[1] In making his motion, defendant's counsel did not state the rule number or numbers under which he was proceeding as required by Rule 6 of the General Rules of Practice for the Superior and District Courts, Supplemental to the Rules of Civil Procedure. See *Long v. Coble*, 11 N.C. App. 624, 182 S.E. 2d 234 and *Lee v. Rowland*, 11 N.C. App. 27, 180 S.E. 2d 445.

[2] Adherence to this requirement would have been particularly helpful here where defendant was apparently seeking a new trial on grounds set forth in G.S. 1A-1, Rule 59(a) (5) (7) (9), and also a directed verdict under the provisions of G.S. 1A-1, Rule 50. Clearly, defendant, who had the burden of proof on all the issues, was not entitled to a directed verdict. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297.

[3] No complaint is made by plaintiff with respect to defendant's failure to comply with Rule 6 of the General Rules of Practice, and the order entered by the court is treated by the parties in their briefs as an order setting aside the verdict in the court's discretion. Where an order setting aside a verdict does not show whether it was made in the exercise of discretion or as a matter of law, it will be considered to have been made in the exercise of discretion. *Jones v. Insurance Co.*, 210 N.C. 559, 187 S.E. 769; 2 McIntosh, N. C. Practice and Procedure 2d, § 1594 (Supp. 1970).

It is well established in this jurisdiction that a trial court has the inherent power to set aside a verdict in its discretion and its action in doing so is not subject to review on appeal, in the absence of a manifest abuse of discretion. *Goldston v. Chambers*, 272 N.C. 53, 157 S.E. 2d 676; *Reece v. Reece*, 6 N.C. App. 606, 170 S.E. 2d 546; 2 McIntosh, N. C. Practice and Procedure 2d, § 1594, at 93, 94. No abuse of discretion has been shown here and the appeal is subject to be dismissed.

[4] Plaintiff attempts to assign as error the court's denial of his motion for a directed verdict made at the close of defendant's evidence and renewed at the close of all of the evidence. Since there is neither verdict nor judgment in the record, there is no basis upon which an appeal on this ground may rest. *Atkins v. Doub*, 260 N.C. 678, 133 S.E. 2d 456.

Appeal dismissed.

Judges MORRIS and PARKER concur.

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In re Martin

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IN THE MATTER OF: GARY MARTIN, KERMIT HULL  
AND JAY HAMPTON

No. 7127SC671

(Filed 15 December 1971)

**Contempt of Court § 6— validity of contempt order — order entered after session of court**

Trial judge's order finding newspaper photographers guilty of direct contempt of court is invalid on the ground that the order was rendered after the expiration of the session of court at which the contempt hearing was held.

ON writ of *certiorari* to review an order dated 10 June 1971 entered by *Beal, Special Judge*, in the Superior Court of GASTON County.

Judge Beal was assigned to hold and presided at the two-week Schedule A Criminal Session of Superior Court in Gaston County which commenced on 12 April 1971. At that session the case of *State v. Fite*, in which the defendant was charged with first-degree murder, came to trial, the trial commencing on 12 April 1971 and continuing into the second week of the session. While the trial was in progress a photograph of the defendant, taken as he was being transported from the jail to the courtroom, was published in the *Gastonia Gazette*, a daily newspaper published in Gaston County. Judge Beal subsequently found in the order here under review that he "issued an order to bailiffs Horace Helms and Frank Carpenter that no further photographs would be permitted to be taken at any time during the course of the trial of any witnesses, the defendant, or members of the jury." This order was not entered on the minutes of the court and so far as the record reveals was never reduced to writing.

At all times during the trial of the case of *State v. Fite* the jurors were sequestered and between court sessions were under the supervision of the two bailiffs. The jurors spent the night of 19 April 1971 in a motel located approximately two miles from the courthouse. At that time evidence in the case of *State v. Fite*, arguments of counsel, and the charge of the court had been completed.

At approximately 8:20 a.m. on the morning of 20 April 1971, as the jurors were about to leave the motel to return to

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In re Martin

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the courthouse, Gary Martin, a newspaper reporter, and Kermit Hull and Jay Hampton, newspaper photographers, took or attempted to take photographs of the jurors. This occurred on the motel parking lot, Judge Beal not being present. The three newspapermen were thereupon arrested and their cameras were seized by the two bailiffs, who took them under custody to the courthouse, where Judge Beal was informed of the incident at approximately 9:00 a.m. Court convened at 9:30 a.m. and the jury retired to continue its deliberations in the case of *State v. Fite*. A conference then took place in the judge's chambers between Judge Beal and the newspaper editor. After the editor agreed with the court that no pictures of the jury would be published in the newspaper, the three arrested newspaper employees were released and their cameras were returned to them.

Late in the afternoon of 20 April 1971, at approximately 5:20 p.m., one of the bailiffs reported to the court that a juror had become ill, and the court, after hearing from a doctor, ordered a mistrial in the case of *State v. Fite*.

On the following day, 21 April 1971, Judge Beal telephoned the editor of the newspaper and informed him that he was ready to hold a hearing concerning the actions of the newspaper reporter and the two newspaper photographers in taking or attempting to take pictures of the jury on the morning of 20 April 1971. Pursuant to this telephone notice, a hearing was held before Judge Beal at the courthouse on the afternoon of 21 April 1971. The two bailiffs testified that they had informed the newspaper employees of the judge's order not to take pictures of the jurors and testified concerning the actions of the three defendants in attempting to take the pictures. At the conclusion of this hearing on 21 April 1971, the judge stated that he would make and file his findings as soon as he could but that he did not know how long this would take. The minutes of the court for 21 April 1971 contain the following: "The Court orders a hearing on the arrests of three Gazette reporters, Gary Martin, Jay Hampton and Kermit Hull. The Court delays judgment for a few weeks." The two-week Schedule A Criminal Session of Superior Court held in Gaston County which commenced on 12 April 1971 ended on Friday, 23 April 1971.

On 10 June 1971 Judge Beal signed an order making findings of fact and conclusions of law. In this order the judge found Gary Martin, Kermit Hull and Jay Hampton in direct contempt of court, but imposed no punishment. The order con-

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**Gray v. Clark**

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tains a direction that it be filed with the clerk of Superior Court of Gaston County and made a part of the minutes of the trial of the case of *State v. Fite*. Petition for writ of certiorari to review this order of Judge Beal dated 10 June 1971 was allowed by the Court of Appeals on 8 July 1971.

*Attorney General Robert Morgan by Associate Attorney General Richard B. Conley for the State.*

*Garland, Alala, Bradley & Gray by Joseph B. Alala, Jr., and Charles D. Gray III; and Lassiter & Walker by William C. Lassiter and James H. Walker for defendant appellants.*

PARKER, Judge.

The order finding appellants guilty of direct contempt of court was rendered seven weeks after expiration of the session of court at which the matter was heard. Under the circumstances of this case and absent consent of the accused contemnors, the trial judge lacked any authority to enter such an order after expiration of the session. For that reason alone, and quite apart from all questions as to adequacy of the notice of the hearing to meet the requirements of G.S. 5-7 and of due process, the order must be vacated. It is therefore unnecessary for us to consider the other questions raised in appellants' brief.

The order dated 10 June 1971 finding appellants in direct contempt of court is hereby

Vacated.

Judges MORRIS and VAUGHN concur.

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CARL R. GRAY v. JESSE B. CLARK AND WIFE, JEANNE W. CLARK

No. 7126SC589

(Filed 15 December 1971)

**Animals § 2— collision between motorcycle and dog — municipal ordinance prohibiting keeping dog which chases vehicles — scienter**

In this action to recover for personal injuries sustained when plaintiff motorcyclist collided with a dog owned by defendants, the trial court erred in instructing the jury that before the defendants could be found to have violated a municipal ordinance making it unlawful to keep within the municipality a dog which habitually or

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Gray v. Clark

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repeatedly chases, snaps at, attacks or barks at pedestrians, bicyclists or vehicles, the jury must find from the evidence that defendants knew or in the exercise of due care should have known that their dog was of the type described in the ordinance, since scienter is not an essential element of the unlawful conduct proscribed by the ordinance.

APPEAL by plaintiff from *Thornburg, Judge*, 22 February 1971 Special Civil Session of Superior Court held in MECKLENBURG County.

Action to recover damages for personal injuries sustained by plaintiff when the motorcycle he was riding on a public street in the City of Charlotte collided with defendants' dog. Plaintiff alleged that defendants violated Section 3-22 of the Code of the City of Charlotte, which provides, in part, as follows:

"ACTS DEEMED PUBLIC NUISANCE. It shall be unlawful for any dog owner to keep or have within the City a dog that habitually or repeatedly chases, snaps at, attacks or barks at pedestrians, bicyclists or vehicles, . . . or conducts itself so as to be a public nuisance. . . ."

The first trial of this case resulted in a directed verdict for defendants. Upon appeal, this Court reversed, holding: (1) that Section 3-22 of the Code of the City of Charlotte was within the police power of the municipality; and (2) that the evidence, when considered in the light most favorable to plaintiff, was sufficient to entitle the plaintiff to have the jury pass on the question whether the defendants violated Section 3-22 by keeping within the corporate limits of the municipality a dog which habitually or repeatedly chased, snapped at, attacked or barked at pedestrians, bicyclists or vehicles, and if so, whether such violation was a proximate cause of plaintiff's injuries. *Gray v. Clark*, 9 N.C. App. 319, 176 S.E. 2d 16. Petition for certiorari was denied by the Supreme Court, 277 N.C. 351 (November 1970).

Upon a second trial, the case was submitted to the jury upon issues of negligence, contributory negligence, and damages. The court instructed the jury that before the defendants could be found to have violated the Ordinance, the jury must find from the evidence that defendants knew or in the exercise of due care should have known that their dog was of the type described in the Ordinance.

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Gray v. Clark

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The jury answered the first issue in the negative. From judgment on the verdict that plaintiff recover nothing of defendants, plaintiff appealed, assigning as error the above instruction to the jury.

*Don Davis for plaintiff appellant.*

*Carpenter, Golding, Crews & Meekins by John G. Golding, for defendant appellees.*

PARKER, Judge.

Section 3-22 of the Code of the City of Charlotte makes it "unlawful for any dog owner to keep or have within the City" a dog of the type described. Nothing in the Section restricts its application to those dog owners who know or in the exercise of due care should know that their dogs are of that type. *Scienter* is not an essential element of the unlawful conduct proscribed by the Ordinance. It was, therefore, error for the trial court to add such a requirement, and appellant's assignment of error to the court's instruction to the jury must be sustained. *Sink v. Moore*, 267 N.C. 344, 148 S.E. 2d 265, cited and relied on by defendants, is not here controlling. In *Sink* our Supreme Court was dealing with the common law rule applicable to the owner or keeper of a dog and no statute or city ordinance was involved. Under the common law rule, to recover for injuries inflicted by a domestic animal it was necessary to show not only that the animal was dangerous but also that the owner or keeper knew or should have known of its vicious propensity. Under the City Ordinance here involved, proof of *scienter* is not required.

On the previous appeal of this case, this Court held that the City had authority to adopt Section 3-22. The opinion viewed the Ordinance as having been enacted for the safety and protection of the public, so that its violation is negligence *per se*, citing *Bell v. Page*, 271 N.C. 396, 156 S.E. 2d 711. Appellees now strongly urge that we reconsider our previous decision, vigorously contending both that the City lacked power to enact the Ordinance and that, even if it had such power, nothing in the Ordinance demonstrates that it was enacted for the public safety. In view of the fact that our Supreme Court denied appellees' petition for writ of certiorari to review our previous decision, we do not think it proper for this Court now to undertake such a review. Moreover, in our opinion appellees' counsel

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State v. Ellis

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views the Ordinance too narrowly; in these days of congested city streets a dog which "habitually or repeatedly" chases passing vehicles can add substantially to traffic hazards.

While plaintiff's evidence was meager that defendants' little dog was of the type described in the Ordinance, when viewed in the light most favorable to the plaintiff the evidence was sufficient to require submission of the case to the jury.

For the error above noted in the court's charge to the jury, plaintiff is entitled to a

New trial.

Judges BRITT and MORRIS concur.

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STATE OF NORTH CAROLINA v. AMOS ELLIS

No. 717SC550

(Filed 15 December 1971)

**1. Criminal Law § 23— validity of guilty pleas — defendant's taking of a tranquilizer**

Defendant's guilty pleas were not rendered invalid by the fact that defendant was taking a tranquilizer called Thorazine, where defendant admitted to the judge that his ability to reason and understand was not affected by the tranquilizer.

**2. Criminal Law § 137— validity of sentencing — defective counts — plea of guilty to consolidated counts**

Where two defective larceny counts were consolidated with other and valid counts for judgment and the punishment imposed did not exceed the maximum statutory punishment for any one of the valid counts, a plea of guilty on any of the valid counts will support the judgment.

APPEAL by defendant from *Tillery, Judge*, 19 April 1971 Session, Superior Court of EDGECOMBE County.

Defendant, Amos Ellis, was charged with six counts of felonious breaking and entering, six counts of felonious larceny and one count of misdemeanor larceny. On 17 March 1971 the defendant was committed by court order to the Cherry Hospital at Goldsboro for 60 days observation and examination to determine whether he was mentally competent and thus able to stand trial. When the defendant was discharged from the hos-

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pital on 20 April 1971, the psychiatric report made by Dr. I. Retenis, Regional Director, Forensic Psychiatry, recommended that the defendant was without psychosis and was able to stand trial.

The cases were consolidated for trial and on 21 April 1971, the defendant, through his court-appointed attorney, entered a plea of guilty to each of the 13 charges. The presiding judge examined the defendant to determine whether his plea was voluntarily and understandingly given. The defendant then signed the transcript of plea verifying that his answers were true and correct. The transcript of plea, as shown by the record, indicated that defendant's guilty plea was voluntarily, understandingly and freely given without undue influence, compulsion or duress and without promise of leniency. The following dialogue then transpired:

"By the Court: I may have misunderstood one of your answers. I asked you if you were under the influence of alcohol, drugs, narcotics, medicines or other pills. What was your answer?

By the defendant: Nothing but thorazine.

By the Court: Thorazine? What effect does that have on you?

By the defendant: I don't know. It's under doctor's medication.

By the Court: How much are you taking?

By the defendant: 50 milligrams three times a day.

By Mr. Hoyle, attorney for the defendant: I understand his physician has given him medication for epilepsy.

By the Court: You have no concern do you, Mr. Ellis, that you understand what you are now talking about?

By the defendant: I know what I am talking about.

By the Court: All right."

As a result of his examination, the court entered an adjudication that thorazine in no way affected defendant's ability to reason and understand and that he freely, understandingly and knowingly pleaded guilty and ordered that his plea of guilty be entered in the record. As a result of his guilty plea to 13

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offenses, defendant was sentenced to eight to ten years in prison. Defendant appealed in forma pauperis to this Court.

*Attorney General Morgan by Assistant Attorneys General Melvin and Ray for the State.*

*Taylor, Brinson and Aycock, by William W. Aycock, Jr., for defendant appellant.*

MORRIS, Judge.

[1] Defendant on appeal contends that he was under the influence of drugs at the time of the entering of his guilty pleas, and that he did not know what he was doing. The record clearly shows the facts to be to the contrary. The questions asked of defendant by the presiding judge were substantially the same as the ones asked in *State v. Adams*, 277 N.C. 427, 178 S.E. 2d 72 (1970), to determine whether the guilty pleas were voluntarily, intelligently and understandingly made. In compliance with *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S.Ct. 1709 (1969), this Court has held that it must affirmatively appear on the record that a plea of guilty was understandingly and voluntarily made. *State v. Harris*, 10 N.C. App. 553, 180 S.E. 2d 29 (1971). This case is in compliance with *Harris* as evidenced by the record which includes a "transcript of plea" and an "adjudication" by the court that the guilty pleas were freely and voluntarily made.

The only remaining question then is whether the record reveals ample evidence to support the trial judge's finding. We think that it does. Thorazine is the trade name for the preparation of chlorpromazine hydrochloride and is used as a tranquilizer. Tranquilizer, as commonly defined, is a medicinal substance which calms the emotions of a patient without affecting the clarity of consciousness. See Dorland, *Illustrated Medical Dictionary* 294, 1577, 1603 (24th Ed. 1965); Schmidt, *Attorney's Dictionary of Medicine* 177, 900 (1969). By his own admission the defendant's ability to reason and understand was in no way affected by the drug thorazine. Where it appears that the trial judge made careful inquiry of the accused as to the voluntariness of his pleas, and there is ample evidence to support the judge's finding that defendant freely, understandingly and voluntarily pleaded guilty to the charges, the acceptance of defendant's guilty plea will not be disturbed on appeal. *State v. Hunter*, 279 N.C. 498, 183 S.E. 2d 665 (1971).

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[2] It appears that the count of larceny in two of the indictments might well be defective for insufficient description of the property. However, conceding this to be true, no prejudice has resulted. These two counts were consolidated for judgment with six charges of felonious breaking and entering, four other charges of felonious larceny, and one charge of misdemeanor larceny. Judgment on all these counts was imprisonment for not less than eight nor more than ten years. Obviously a plea of guilty on any one count of felonious breaking and entering or felonious larceny would support the judgment.

No error.

Judges CAMPBELL and PARKER concur.

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MAURICE H. EDWARDS, JR. v. CECELIA BYERS EDWARDS

No. 7127DC603

(Filed 15 December 1971)

**Rules of Civil Procedure § 4; Process § 10— service by publication — filing of affidavit showing circumstances of publication**

Where service of summons is made by publication, the plaintiff must file an affidavit specifically alleging that the statutory notice of publication has been mailed or, in the alternative, that the defendant's dwelling house is unknown and cannot with due diligence be ascertained; failure to file the affidavit constitutes a defective service of process. G.S. 1A-1, Rule 4(j) (9) (c).

APPEAL by defendant from *Mull, Judge*, 24 May 1971 Session of District Court, GASTON County.

On 21 August 1970, plaintiff filed a complaint for absolute divorce and custody of the child of plaintiff and defendant, alleging that the "defendant has temporarily left the State of North Carolina and remains, to the plaintiff and (sic) is informed and believes and so alleges, in the City of Salt Lake, Utah, but that otherwise whereabouts of the defendant are presently unknown to the plaintiff." Plaintiff alleged that there was pending in the District Court of Gaston County an action entitled "Cecelia Byers Edwards v. Maurice Edwards, Jr." and requested that all pleadings and orders in that action be "incorporated in this paragraph as if fully set out herein." There-

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after notice of service by publication was published in the Mount Holly News and affidavit of publication was filed with the court. On 12 October 1970 judgment was entered granting plaintiff an absolute divorce and awarding custody of the child to the plaintiff. An additional judgment was entered the same day finding facts (apparently from pleadings and orders in the prior action) relating to the custody of the child and awarding sole custody to plaintiff. On 18 December 1970 defendant, through counsel and by special appearance, moved that the divorce decree and judgment pertaining to custody be declared null and void for failure to secure proper service of process on defendant. Plaintiff answered the motion and attached thereto copies of all pleadings and orders in the previous action between the parties. Hearing on defendant's motion was had and the court entered an order, again finding facts from the pleadings in the pending action, and denied the motion. Defendant appealed, assigning as error certain of the findings of fact and the entry of the order denying her motion.

*Joseph B. Roberts III for plaintiff appellee.*

*Hollowell, Stott and Hollowell, by Grady B. Stott, for defendant appellant.*

MORRIS, Judge.

The primary question presented by this appeal is whether the court lacked jurisdiction over the defendant for failure of plaintiff properly to obtain service of process on defendant.

The summons issued was returned by the sheriff bearing only the notation "Not to be found." Upon this return, plaintiff proceeded to attempt to obtain service by publication. Defendant concedes that this is a case in which service by publication can be had.

G.S. 1A-1, Rule 4(j) (9) (c) provides:

"Service by publication—A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown *and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph b or under paragraphs a*

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and b of this subsection (9). . . . If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. *Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2) and the circumstances warranting the use of service by publication.*" (Emphasis supplied.)

"Service of process by publication is in derogation of the common law. Statutes authorizing it, therefore, are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute. (Citations omitted.)" *Harrison v. Hanvey*, 265 N.C. 243, 247, 143 S.E. 2d 593, 596 (1965).

Prior to repeal by the 1971 General Assembly, G.S. 1-98.1 through G.S. 1-99.4 provided for service of process by publication or service of process outside the State. The procedure to effectuate that type of service, G.S. 1-98.4, provided that in order to secure an order for service of process by publication or service of process outside the State, the applicant had to file either by verified pleading or by separate affidavit a sworn statement stating, among other things, "that after due diligence, personal service cannot be had within the State."

Our Supreme Court has repeatedly held that failure to comply with the statute was fatal. In *Nash County v. Allen*, 241 N.C. 543, 85 S.E. 2d 921 (1955), Justice Winborne (later C.J.) referred to *Commissioners of Roxboro v. Bumpass*, 233 N.C. 190, 63 S.E. 2d 144 (1951), wherein Justice Barnhill reviewed and cited the authorities in this State. In *Temple v. Temple*, 246 N.C. 334, 98 S.E. 2d 314 (1957), Johnson, J., said:

"It thus appears that the trial judge erred in dismissing the action after verdict on the ground of insufficiency of the evidence to support the verdict. However, the error seems to be immaterial. This is so because of a fatal defect of jurisdiction appearing on the face of the record. The complaint alleges that the defendant is a resident of Lewistown, Pennsylvania. The transcript discloses pur-

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ported service of summons upon the defendant by the Sheriff of Mifflin County, Pennsylvania. However, nowhere in the record is there a sworn statement or affidavit 'That, after due diligence, personal service cannot be had within the state,' as required by Chapter 919, Section 1, Session Laws of 1953, now codified in pertinent part as G.S. 1-98.4(a) (3). Compliance with this statute is mandatory. The affidavit or sworn statement is jurisdictional. Without it, service outside the State is ineffectual to bring the defendant into court. See *Nash County v. Allen*, 241 N.C. 543, 85 S.E. 2d 921; *Groce v. Groce*, 214 N.C. 398, 199 S.E. 388; *Denton v. Vassiliades*, 212 N.C. 513, 193 S.E. 737."

It is true that G.S. 1A-1, Rule 4, does not require an order of publication supported by an affidavit. However, in order to utilize service of process by publication under this statute it is necessary that plaintiff file with the court an affidavit showing the "circumstances warranting the use of service by publication." Among those circumstances, as specifically set out in the statute, is when the defendant's dwelling house or usual place of abode is unknown and cannot *with due diligence be ascertained*. See 5 Wake Forest Intramural Law Review 46, 65, Jurisdiction and Process, Ralph M. Stockton, Jr. (1968), where the author commented that Rule 4(j), which contains the section providing for service by publication, contains eight subsections and sets forth in detail the specific manner of service of process in various types of actions and under various circumstances. He commented further: "The section is tied closely to the new jurisdiction statute, G.S. 1-75.1 et seq., and the two are complementary to one another. While the jurisdiction statute greatly liberalizes the grounds for jurisdiction, the rules regarding service of process are tightened to insure as much as possible that the defendant receives actual notice of the controversy."

Here the record clearly shows that plaintiff failed to comply with the statute not only in failing to file the affidavit required by G.S. 1A-1, Rule 4(j) (9) (c), but in failing to file affidavit that notice of publication had been mailed as required by statute or in the alternative, a showing that reasonable diligence had been exercised, without success, to determine defendant's post office address.

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Since service of process was not completed at the time of the rendition of the judgment herein, the judgment was improvidently entered and must be set aside.

Reversed.

Judges PARKER and GRAHAM concur.

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**STATE OF NORTH CAROLINA v. GILBERT HOOD**

No. 718SC510

(Filed 15 December 1971)

**1. Searches and Seizures § 3— validity of narcotics search warrant**

Narcotics search warrant and its attached affidavit were in substantial compliance with statutory and constitutional requirements. G.S. Ch. 15, Art. 4.

**2. Criminal Law § 99— trial court's questioning of witnesses**

Trial court's questioning of S.B.I. agents concerning their handling of an exhibit in a narcotics case did not constitute an expression of opinion, but such questioning was merely for purposes of clarification of the agents' testimony. G.S. 1-180.

**3. Narcotics § 3— heroin prosecution — admission of exhibits**

In a prosecution charging defendant with the possession of heroin, it was proper to admit in evidence a matchbox and its contents of heroin which defendant threw on the floor when he was confronted by an S.B.I. agent.

APPEAL by defendant from *Cohoon, Judge*, 11 January 1971 Session of Superior Court held in LENOIR County.

The defendant was charged in a bill of indictment, proper in form, with the possession of the narcotic drug heroin, in violation of G.S. 90-88. Upon the defendant's plea of not guilty, the State introduced evidence tending to show the following: On 27 March 1970, at about 3:20 a.m., armed with a search warrant, W. W. Campbell, an agent for the State Bureau of Investigation, in company with deputy sheriffs of Wayne County and a police officer of the Town of LaGrange, went to Gilbert Hood's dance hall and cafe and knocked on the door. The defendant came to the door, and when he was asked by Agent Campbell if he was Gilbert Hood, he stated that he was. The defendant

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opened the screen door and the officer stepped inside and identified himself. The defendant pulled his hands out of his pocket and threw something on the floor. The officer picked it up and found that it was a small matchbox containing capsules of white powder. Agent Campbell put the matchbox and its contents in a small envelope. Agent Campbell gave the envelope containing the matchbox to W. H. Thompson, Special Agent of the State Bureau of Investigation. After Agent Thompson had initialed the matchbox and sealed it in the small envelope, he and Agent Campbell put the package inside a larger envelope which they mailed to the State Bureau of Investigation Laboratory in Raleigh.

J. M. Dismukes, an analytical chemist employed in the State Bureau of Investigation Laboratory in Raleigh, received the package from Agent Thompson which he opened and found the small envelope containing the matchbox and the capsules. The white powder in the capsules was analyzed and found to contain a mixture of heroin and quinine. Mr. Dismukes initialed the matchbox, put it back in the small envelope, which he in turn put in the original envelope received from Agent Thompson, and mailed the entire package to Agent Thompson. Agent Campbell and Mr. Dismukes both identified the separate packages at the trial, and Mr. Dismukes testified that the small capsules contained heroin.

The defendant offered no evidence.

The jury found the defendant guilty as charged, and from a judgment imposing a prison sentence of not less than four nor more than five years, the defendant appealed.

*Attorney General Robert Morgan and Deputy Attorney General Andrew A. Vanore, Jr., for the State.*

*Herbert B. Hulse; and Beech and Pollock by D. D. Pollock for defendant appellant.*

HEDRICK, Judge.

[1] Defendant first assigns as error the court's denial of his motion to quash the search warrant and suppress the evidence obtained from the search of the defendant's premises for that the affidavit upon which the search warrant was issued failed to meet the test for probable cause required by the decisions of

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the Supreme Court of the United States in the case of *Aguilar v. Texas*, 378 U.S. 108, 12 L. ed. 2d 723, 84 S.Ct. 1509 (1964); *Spinelli v. United States*, 393 U.S. 410, 21 L. ed. 2d 637, 89 S.Ct. 584 (1969). The requirements of *Aguilar* and *Spinelli* have been thoroughly discussed by the appellate courts in this State. Suffice it to say, in the instant case we have carefully examined the search warrant and the attached affidavit in the light of Article 4, Chapter 15, of the General Statutes of North Carolina, which was rewritten in 1969 to be effective upon its ratification on 19 June 1969, and in the light of the decisions in *Aguilar v. Texas*, *supra*; *Spinelli v. United States*, *supra*; *State v. Flowers*, 12 N.C. App. 487, 183 S.E. 2d 820 (1971); *State v. Moye*, 12 N.C. App. 178, 182 S.E. 2d 814 (1971); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971); and *State v. Staley*, 7 N.C. App. 345, 172 S.E. 2d 293 (1970), and we hold the search warrant and the attached affidavit are in substantial compliance with statutory and constitutional requirements.

[2] Defendant contends the judge expressed an opinion, in violation of G.S. 1-180, by interrupting direct and cross-examination to ask questions of witnesses. An examination of all the exceptions noted in the record upon which this assignment of error is based reveals that all of the questions complained of were asked by the judge of S.B.I. Agents Campbell and Dismukes and related to their packaging, mailing, receipt, and opening of the small matchbox and its contents. It is a well settled rule in this State that a trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. *State v. Strickland*, 254 N.C. 658, 119 S.E. 2d 781 (1961); *Andrews v. Andrews*, 243 N.C. 779, 92 S.E. 2d 180 (1956); *Wilkins v. Turlington*, 266 N.C. 328, 145 S.E. 2d 892 (1966); *State v. Blalock*, 9 N.C. App. 94, 175 S.E. 2d 716 (1970). We hold the questions asked by the judge in the instant case were clearly for the purpose of obtaining a proper understanding and clarification of the witnesses' testimony and did not in any way amount to an expression of opinion, in violation of the statute. This assignment of error is not sustained.

[3] Based on one exception in the record, the defendant contends the court erred in admitting into evidence over defendant's objection State's Exhibits 1, 2 and 3. This assignment of error has no merit. The matchbox and its contents (State's Exhibit 1),

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the small envelope in which the matchbox and its contents were sealed (State's Exhibit 2), and the large envelope in which the small envelope and matchbox were mailed to the S.B.I. Laboratory (State's Exhibit 3), were all properly identified by the witnesses Campbell and Dismukes at the trial, and the court did not commit prejudicial error in allowing the State to introduce these exhibits into evidence.

Next, the defendant contends the court erred in denying his motion for judgment as of nonsuit made at the close of all the evidence. There is sufficient evidence in the record requiring the submission of this case to the jury.

We have carefully examined all of the defendant's assignments of error and find no prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

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A. TURNER SHAW, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF MARCEL M. POLIQUIN, DECEASED v. JOHN E. STILES; A. C. CANADY AND WIFE, MABEL CANADY; LESTER EUGENE ANDERSON AND WIFE, PEGGY ANN ANDERSON; JOHN D. JENKINS AND ROBERT L. MATTOCKS, II, D/B/A JENKINS GAS COMPANY

No. 714SC748

(Filed 15 December 1971)

**Venue § 7— motion to remove as matter of right**

Where a wrongful death action was instituted in Onslow County against two residents of Onslow County, two residents of Jones County, and one out-of-state resident, and plaintiff submitted to a voluntary dismissal with prejudice as to the residents of Onslow County, the residents of Jones County were not entitled as a matter of right to have the case removed to their home county, since two defendants were residents of Onslow County at the time the action was commenced, no motion was made by any defendant before the time for answering expired that the trial be conducted in another county, and no question of improper venue was asserted in any answer. G.S. 1-82; G.S. 1-83; G.S. 1A-1, Rule 12.

APPEAL by defendants Jenkins and Mattocks from *Cope-land, Judge*, at the 4 October 1971 Session of ONSLOW Superior Court.

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This civil action to recover for personal injuries sustained by, and the wrongful death of, plaintiff's intestate was commenced in Onslow County by the issuance of summons and filing of complaint on 19 February 1969. Plaintiff ancillary administrator was and is a resident of Onslow County, the domiciliary administratrix of the estate of intestate being a resident of the State of Maine. At all times pertinent to this appeal, the residence of defendants was and is as follows: Stiles, Illinois; Canady and Anderson, Onslow County, N. C.; and Jenkins and Mattocks, Jones County, N. C. The occurrence allegedly injuring and causing the death of plaintiff's intestate took place in Onslow County.

Answers were filed by defendants on the following dates: Jenkins and Mattocks on 28 April 1969; Canady on 29 April 1969; Anderson on 30 April 1969; and Stiles on 10 July 1969. No defendant made motion for removal of the action before filing answer. On 4 October 1971 plaintiff submitted to a voluntary dismissal of the action, with prejudice, as to defendants Canady and Anderson. On 4 October 1971 defendants Jenkins and Mattocks moved that the action be removed to Jones County for trial, contending that there is no longer any real party in interest who is a resident of Onslow County, therefore, Jones County is the proper county of trial of the action.

On 6 October 1971 Judge Copeland entered an order denying the motion to remove, finding as a fact, among other things, that defendants Canady and Anderson were made parties in good faith and were not named as defendants herein "frivolously or as a sham for the purpose of acquiring venue in Onslow County." Defendants Jenkins and Mattocks appealed.

*White, Allen, Hooten & Hines by Thomas J. White III; Warren H. Coolidge, U.S. Attorney, by John R. Whitty; Ward, Tucker, Ward & Smith by David L. Ward, Jr., for plaintiff appellee.*

*Everett L. Wooten, Jr.; Donald P. Brock; Wallace, Langley, Barwick & Llewellyn by R. S. Langley and F. E. Wallace, Jr., for defendant appellants.*

BRITT, Judge.

Absent a motion by plaintiff in this case to dismiss this appeal for that it is not authorized by G.S. 7A-27, (See also

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Rule 4 of Rules of Practice in the Court of Appeals of N. C.), we consider on its merits the question presented, namely, did the trial court err in denying the motion of defendants Jenkins and Mattocks to remove the action to Jones County for trial. We hold that the trial court did not err.

G.S. 1-82, applicable to this case, provides in pertinent part: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, *reside at its commencement*, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; . . . ." (Emphasis ours.) This statute relates to venue as opposed to jurisdiction. *McGovern and Co. v. R. R.*, 180 N.C. 219, 104 S.E. 534 (1920).

G.S. 1-83 provides in pertinent part: "If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, *before the time of answering expires*, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court." (Emphasis ours.)

G.S. 1A-1, Rule 12(b) provides, in pertinent part, that every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that at the option of the pleader improper venue or division may be made by motion *but such motion shall be made before pleading* if a further pleading is permitted. Rule 12(h) (1) provides that a defense of improper venue is waived if not made by motion or in responsive pleading as provided in Rule 12.

We do not find it necessary to answer appellants' contention that although plaintiff ancillary administrator is a resident of Onslow County he is not a real party in interest, therefore, not a plaintiff as envisioned by G.S. 1-82. Suffice to say, since defendants Canady and Anderson were residents of Onslow County at the time the action was commenced, and before the time for answering expired no motion was made by any defendant that the trial be conducted in another county, and no question of improper venue or division was asserted in any answer, appellants are not entitled as a matter of right to have the case removed to their home county. G.S. 1-82; G.S. 1-83; G.S. 1A-1, Rule 12.

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At the time this action was filed, the new Rules of Civil Procedure were not in effect. However, the action was pending on 1 January 1970, the effective date of the rules, and at that time became subject to the rules. Ch. 803, 1969 Session Laws. It has been well settled in this State for many years that venue is not jurisdictional, but is only ground for removal to the proper county, if objection thereto is made in apt time and in the proper manner. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 71 S.E. 2d 54 (1952); *Casstevens v. Membership Corp.*, 254 N.C. 746, 120 S.E. 2d 94 (1961). We find nothing in the new rules that negates this principle; on the contrary the principle appears to be fully supported by Rule 12.

We concede that in this case had any defendant made a motion to remove within the time provided in the statutes, the move would have been futile. Nevertheless, an interpretation by us of applicable statutes and rules as contended by appellants would amount to judicial amendment of statutes. This we refuse to do as we respect a rightful prerogative of the General Assembly. Appellants cite *Powers v. C. & O. R. R. Co.*, 169 U.S. 93 (1898) in support of their contention. It would appear that the court in that case was dealing with jurisdiction, not venue.

For the reasons stated, the order appealed from is

Affirmed.

Judges BROCK and VAUGHN concur.

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STATE OF NORTH CAROLINA v. CHARLES ROBERT CADORA

No. 717SC759

(Filed 15 December 1971)

1. Criminal Law § 23; Burglary and Unlawful Breakings § 10—unlawful possession of housebreaking implements—appeal from guilty plea

Defendant's plea of guilty of unlawful possession of implements of housebreaking precludes defendant from successfully contending on appeal that the items listed in the indictment, "chisel, screwdriver, walkie-talkie, gloves, phone listening devices," were not "other implements of housebreaking" within the meaning of G.S. 14-55 and that he had a lawful excuse to have them in his possession.

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**2. Criminal Law § 138—single sentence for three crimes—support by one conviction**

The trial court did not err in imposing a single sentence of not less than 7 nor more than 10 years upon defendants' pleas of guilty of possession of less than one gram of marijuana, attempted breaking and entering, and possession of burglary tools, since the sentence could have been imposed on the one charge of possession of burglary tools.

**3. Constitutional Law § 36; Criminal Law § 138—cruel and unusual punishment**

Punishment within the limits prescribed by statute is not cruel and unusual punishment.

APPEAL by defendant from *Tillery, Judge*, 14 June 1971 Session of Superior Court for the trial of criminal cases held in EDGECOMBE County.

In case #71CR3607, the defendant was charged in a bill of indictment, proper in form, with the felony of the possession of more than one gram of marijuana, a violation of the Uniform Narcotic Drug Act.

In case #71CR3609, the defendant was charged in a bill of indictment, proper in form, with the felony of breaking and entering a building with intent to steal, a violation of G.S. 14-54(a).

In case #71CR3610, the defendant was charged in a bill of indictment which reads as follows:

"THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT: That Charles Robert Cadora, late of the County of Edgecombe on the 13th day of May, 1971, with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously did and without lawful excuse have in his possession burglary tools to wit: chisel, screwdriver, walkie-talkie, gloves, phone listening devices, which are implements of house breaking, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State."

The defendant entered the following pleas: In case #71CR3607, he entered a plea of guilty of possession of less than one gram of marijuana; in case #71CR3609, he entered a plea of guilty of attempted breaking and entering; and in case #71CR3610, he entered a plea of guilty of the possession of burglary tools.

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After questioning the defendant under oath, in open court, as to the voluntariness of his plea (as appears in the transcript of plea set out in the record), the trial court adjudged that the plea of guilty was freely, understandingly and voluntarily made.

All three charges to which the plea of guilty was made were consolidated for judgment, and the defendant was sentenced to not less than seven years nor more than ten years.

The defendant appealed to the Court of Appeals.

*Attorney General Morgan and Associate Attorney Conely for the State.*

*George A. Goodwyn for defendant appellant.*

MALLARD, Chief Judge.

[1] Defendant's first contention is that the bill of indictment in case #71CR3610 is not sufficient to charge him with the felony of possession of burglary tools in violation of G.S. 14-55.

The pertinent parts of G.S. 14-55 read as follows:

"If any person . . . shall be found having in his possession, *without lawful excuse*, any picklock, key, bit, or other implement of housebreaking . . . such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court." (Emphasis added.)

In the bill of indictment it is alleged, among other things, that the defendant did "*without lawful excuse* have in his possession burglary tools to wit: chisel, screwdriver, walkie-talkie, gloves, phone listening devices, *which are implements of housebreaking.*" (Emphasis added.) Although these instruments have other uses which are legitimate and were not made for the specific purpose of breaking into buildings, it is common knowledge that chisels and screwdrivers can be, and may be, used as implements of housebreaking. See *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968); *State v. Morgan*, 268 N.C. 214, 150 S.E. 2d 377 (1966); *State v. Baldwin*, 226 N.C. 295, 37 S.E. 2d 898 (1946); and *State v. Vick*, 213 N.C. 235, 195 S.E. 779 (1938).

The evidence for the State was that the defendant was a passenger in an automobile being operated by one John Wesley

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Bailey on Highway #44 North of Tarboro when it was stopped by police officers. State's witness, Deputy Sheriff Enoch Sawyer, testified:

"\* \* \* Upon examination of the car, I saw a portion of a fifth of liquor, taxpaid, in the back seat of the car, and immediately, Chief Webb advised the persons in the car of their rights. Charles Robert Cadora said he was the owner of the car, and gave us permission to search the car, and upon the search, we found marijuana which tested out at 11.1 grams, and also 70 nembutal capsules, a telephone test set, binoculars, chisels, screwdriver, tire tool, set of walkie-talkies, two pistols, two stockings with mouth places out of it, three pair of gloves, two pair of leather gloves, one pair of rubber gloves. The guns were loaded and the chemical analysis of the drugs showed positive. The SBI chemical analysis was also made.

The Defendants, Ruiz, Bailey, and Cadora, did not go into the trailer but they broke the glass out of the door, then went under the trailer. \* \* \*

During the entry of the plea of guilty in superior court and while the evidence with respect to punishment was being received, the defendant did not contend that the chisel, screwdriver, walkie-talkie, gloves, and phone-listening devices were not implements that could be used in housebreaking; nor did he contend that he had a lawful excuse for the possession of these instruments under the circumstances. On the contrary, when he was asked by the presiding judge if he understood that he was charged with the possession of burglary tools, he replied under oath that he did. Thereupon, the judge asked him how he pleaded to the charge, and he replied, "Guilty." Then the judge asked him, "Are you in fact guilty?" The defendant, who was sworn to tell the truth, replied, "Yes." But now he contends that these instruments in combination, as described in the bill of indictment, are not "other implements of housebreaking" as defined in the statute. This contention comes too late. The defendant, by his plea of guilty, after being sworn to tell the truth, informed the court that he had no lawful excuse to possess the "chisel, screwdriver, walkie-talkie, gloves, phone listening devices." Also, by stating under oath to the judge that he was guilty, he admitted that they were implements of housebreaking. The guilty plea thus eliminated the burden on the State to prove that the

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State v. Cadora

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defendant had in his possession an implement or implements of housebreaking enumerated in, or which come within, the provision of G.S. 14-55, and that such possession was without lawful excuse. See *State v. Caldwell*, 269 N.C. 521, 153 S.E. 2d 34 (1967). Under the factual circumstances of this case, this defendant cannot now successfully urge that the combination of instruments as set out in the bill of indictment did not fit the description of "other implements of housebreaking" and that he had a lawful excuse to have them in his possession.

[2] The defendant also contends that the court committed error in sentencing him for a term of not less than seven years nor more than ten years. This contention is without merit. All three of the charges in this case were consolidated for judgment. The sentence imposed could have been imposed on the one charge of the unlawful possession of implements of housebreaking. The Supreme Court, in *State v. Blackmon*, 260 N.C. 352, 132 S.E. 2d 880 (1963), held that the maximum punishment for the unlawful possession of implements of housebreaking is ten years.

[3] The defendant further contends that the sentence of seven to ten years imprisonment is cruel and unusual punishment and in violation of law. This contention is also without merit. It is the law in North Carolina that punishment is not cruel and unusual punishment if it is within the limits prescribed by the General Assembly. *State v. Williams*, 279 N.C. 515, 184 S.E. 2d 282 (1971); *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Lovelace*, 271 N.C. 593, 157 S.E. 2d 81 (1967); *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966); *State v. Culp*, 5 N.C. App. 625, 169 S.E. 2d 10 (1969); *State v. Morris*, 2 N.C. App. 611, 163 S.E. 2d 539 (1968).

No error.

Judges HEDRICK and GRAHAM concur.

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Bryant v. Ballance

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LUCY G. BRYANT, ADMINISTRATRIX OF THE ESTATE OF WILLIE BRYANT  
v. WILLIAM D. BALLANCE

No. 717SC496

(Filed 15 December 1971)

**1. Evidence § 11—wrongful death action—evidence relating to intestate's knowledge of defendant's intoxication—effect of Dead Man's Statute**

In an action for the wrongful death of plaintiff's intestate who was killed while riding in an automobile operated by the defendant, defendant's testimony that the intestate knew of defendant's intoxication but continued to ride with him was rendered admissible, despite the Dead Man's Statute, when the plaintiff's own witness testified that the defendant was not intoxicated, such testimony opening the door for defendant's version of the matter. G.S. 8-51.

**2. Evidence § 44—nonexpert opinion testimony—evidence of intoxication**

A lay witness is competent to testify whether, in his opinion, a person was drunk or sober on a given occasion on which he observed the person; the conditions under which the witness observed the person, and the opportunity to observe him, go to the weight, not the admissibility, of the testimony.

**3. Automobiles § 94—wrongful death action—intoxication of driver—contributory negligence of intestate**

In an action for the wrongful death of plaintiff's intestate who was killed while riding in an automobile driven by the defendant, evidence that the intestate knew of defendant's intoxication but continued to ride with him was properly submitted to the jury on the issue of the intestate's contributory negligence.

APPEAL by plaintiff from *Tillery, Judge*, 1 March 1971 Session of WILSON Superior Court.

This in an action for wrongful death of plaintiff's intestate who was killed allegedly while riding as a passenger in an automobile driven by defendant. Plaintiff alleges that defendant, while operating his automobile on U. S. Highway 301 in Wilson County, ran off the road, back across the road, and overturned with resultant fatal injuries to her intestate.

In his answer, defendant denied that he was the operator of the car. He further alleged that at the time of the accident he was under the influence of intoxicants and that if he was driving, plaintiff's intestate knew of defendant's intoxication at the time intestate voluntarily entered defendant's car, made no protest as to defendant's condition, and continued to ride

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Bryant v. Ballance

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with defendant with full knowledge of his condition; therefore, intestate was contributorily negligent.

Plaintiff's evidence tended to support her allegations. It further tended to show that neither intestate nor defendant was under the influence of any intoxicant. Defendant's evidence showed that both men were intoxicated shortly before the accident.

The jury answered the issue of negligence in favor of plaintiff but answered the issue of contributory negligence in favor of defendant. From judgment denying recovery, plaintiff appealed.

*Farris and Thomas by Allen G. Thomas for plaintiff appellant.*

*Narron, Holdford and Babb by William H. Holdford for defendant appellee.*

BRITT, Judge.

[1] In her first assignment of error, plaintiff contends that the court erred in admitting certain evidence by defendant for that the evidence violated G.S. 8-51, the "Dead Man's Statute." Assuming, arguendo, that the challenged testimony did violate the statute, it was rendered admissible when the sister of intestate, as plaintiff's witness, testified that defendant was driving and that he was not intoxicated. This opened the door for defendant's version of the matter. *Pearce v. Barham*, 267 N.C. 707, 149 S.E. 2d 22 (1966); *Carswell v. Greene*, 253 N.C. 266, 116 S.E. 2d 801 (1960). The assignment of error is overruled.

[2] Plaintiff alleges error in the admission of opinion testimony of the witness Barnes as to the intoxication of defendant shortly before the accident. Barnes testified that he went to intestate's home around 11:45 p.m. with intestate and defendant; that while there he and defendant, as well as others, drank beer and whiskey; that he got drunk and went to sleep on the front porch of intestate's sister's house; that he saw defendant early the next morning (shortly before the accident); that he had occasion to observe defendant during the course of the night and the next morning and, in his opinion, defendant was intoxicated that morning.

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Bryant v. Ballance

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We hold that the evidence was admissible. A lay witness is competent to testify whether, in his opinion, a person was drunk or sober on a given occasion on which he observed the person. The conditions under which the witness observed the person, and the opportunity to observe him, go to the weight, not the admissibility of the testimony. *State v. Dawson*, 228 N.C. 85, 44 S.E. 2d 527 (1947). See also *State v. Mills*, 268 N.C. 142, 150 S.E. 2d 13 (1966). Plaintiff contends that witness Barnes should have been allowed only to state what he observed defendant do and how defendant acted and that it should have been left to the jury, upon the description provided by the witness, to conclude if defendant was intoxicated. Plaintiff further contends that when the witness admitted that he was intoxicated, this disqualified him as a matter of law to render an opinion as to whether another was intoxicated. We disagree with these contentions; they relate to the weight and not the admissibility of the testimony. *State v. Dawson, supra*.

[3] Plaintiff contends that there was error in submitting the issue of contributory negligence to the jury. We disagree with this contention. There is ample evidence in the record to support the submission of the issue and indeed it would have been error for the judge not to have done so, since the issue was raised in the pleadings and supported by the evidence. "If different inferences may be drawn from the evidence on the issue of contributory negligence, some favorable to the plaintiff and others to the defendant, it is a case for the jury to determine (Citations)." *Wilson v. Camp*, 249 N.C. 754, 107 S.E. 2d 743 (1959). See *Weatherman v. Weatherman*, 270 N.C. 130, 153 S.E. 2d 860 (1967); *Boyd v. Wilson*, 269 N.C. 728, 153 S.E. 2d 484 (1967).

We have considered plaintiff's other assignments of error but finding them without merit, they are overruled.

No error.

Judges BROCK and VAUGHN concur.

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State v. Oliver

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STATE OF NORTH CAROLINA v. JOHN ROBERT OLIVER

No. 7126SC746

(Filed 15 December 1971)

1. Criminal Law § 166—exceptions and assignments of error — failure to properly number and set forth in brief

Appeal is subject to dismissal where the exceptions and assignments of error are not set out in the brief and properly numbered with reference to the printed record as required by Court of Appeals Rule 28.

2. Burglary and Unlawful Breakings § 4; Criminal Law § 33—breaking and entering—evidence that defendant had a gun in his car—relevancy

In a prosecution for breaking and entering, evidence that defendant had a loaded shotgun with extra shells in the automobile in which he attempted to escape from the crime scene was properly admitted as a relevant circumstance tending to throw light upon the crime charged.

3. Burglary and Unlawful Breakings § 5—breaking and entering — sufficiency of evidence

The State's evidence was sufficient for the jury in this prosecution for feloniously breaking and entering a 7-11 Food Store.

APPEAL by defendant from *McLean, Judge*, 9 August 1971 Session of Superior Court held in MECKLENBURG County.

The defendant John Robert Oliver was charged in a bill of indictment, proper in form, with feloniously breaking and entering the 7/11 Food Center, 3309 South Boulevard, Charlotte, North Carolina, in violation of G.S. 14-54. Upon the defendant's plea of not guilty, the State offered evidence tending to show the following: At about 12:30 or 12:45 a.m., on 2 March 1971, Robert H. Hoppenjans and another officer from the Charlotte, North Carolina, Police Department saw the defendant leaning up against the door at the front of the 7/11 Food Center at 3309 South Boulevard, Charlotte, North Carolina. When the officers drove into the parking lot and around to where the defendant was standing, Oliver jumped into a Cadillac automobile and drove away at a high rate of speed. The officers pursued the defendant about 200 yards up the road to where the defendant abandoned his automobile and ran into some woods. The officers chased the defendant and found him hiding under a bush. The officers took the defendant back to the car where Officer Hoppenjans saw two crowbars on the back seat.

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State v. Oliver

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The defendant had left the motor of the Cadillac running and when the officer reached in to turn off the ignition, he saw a loaded shotgun and two shells lying under the front seat.

At about 7:00 a.m., on 2 March 1971, Paul Arrington, one of the owners of the 7/11 Food Center at 3309 South Boulevard, found that the side door to the store was unlocked and the padlock was lying on the floor. When Mr. Arrington inspected his store, he found that a safe which had been embedded in concrete was sitting on a stock cart near the unlocked side door. The safe and the block of concrete in which it sat had been moved approximately 25 feet from its original position. The handle and a piece of the hinge on the door of the safe had been broken and some holes were punched in the door. A broken piece of screwdriver was found wedged in the door of the safe.

Pieces of paint and bits of concrete and mortar dust on the crowbars found in the Cadillac automobile came from the safe and its concrete base located in the 7/11 store where the officers first saw the defendant. The defendant offered no evidence.

The jury found the defendant guilty as charged and from judgment of imprisonment of five years, the defendant appealed.

*Attorney General Robert Morgan and Assistant Attorney General Roy A. Giles, Jr., for the State.*

*Plumides and Plumides by John G. Plumides for defendant appellant.*

HEDRICK, Judge.

[1] The Attorney General suggests, and we agree, that defendant's counsel in the preparation of his brief and the record on appeal has failed to comply with the Rules of Practice in the Court of Appeals in that the exceptions and assignments of error are not set out in the brief and properly numbered with reference to the printed record as required by Rule 28. In addition, none of the exceptions noted in the record are numbered. Although the appeal is subject to dismissal for failure to comply with the Rules of Practice in the Court of Appeals, *State v. Black*, 7 N.C. App. 324, 172 S.E. 2d 217 (1970); *Williford v. Williford*, 10 N.C. App. 541, 179 S.E. 2d 118 (1971), we do not do so but consider the questions raised by the assignments of error.

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State v. Oliver

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[2] The defendant assigns as error the court's allowing the State to introduce into evidence the shotgun and shotgun shells found by Officer Hoppenjans in the defendant's automobile. The defendant contends that the evidence regarding the shotgun and the shotgun shells was irrelevant and of no probative value and tended only to excite prejudice in the minds of the jury against the defendant. We do not agree. "In criminal cases every circumstance that is calculated to throw light upon the supposed crime is relevant and admissible if competent." 2 Strong, N. C. Index 2d, Criminal Law, § 33, p. 531. All facts relevant to the proof of the defendant's having committed the offense with which he is charged may be shown by evidence, otherwise competent, even though that evidence necessarily indicates the commission by him of another offense. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Engle*, 5 N.C. App. 101, 167 S.E. 2d 864 (1969). We think the testimony and exhibits that the defendant had a loaded shotgun with extra shells in the automobile in which he attempted to escape from the scene of the crime charged in the bill of indictment were properly allowed into evidence as a relevant circumstance tending to throw light upon the crime charged. This assignment of error is overruled.

[3] The defendant assigns as error the court's denial of his motion for judgment as of nonsuit made at the close of all the evidence. When the evidence is considered in the light most favorable to the State, and giving it the benefit of every reasonable inference to be deduced therefrom, we hold it is sufficient to require the submission of the case to the jury.

We find the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

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State v. Ruiz

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STATE OF NORTH CAROLINA v. RIGOBERTO RUIZ, ALIAS BOB  
EUGENE REEVES AND E. B. REEVES

No. 717SC761

(Filed 15 December 1971)

**1. Criminal Law § 134—sentencing of defendant—mistaken reference to another crime—harmless error**

After examining defendant concerning the voluntariness of his guilty pleas to the possession of burglary tools and attempted breaking and entering, and while entering an adjudication with respect to the pleas, the trial judge mistakenly asserted that the defendant had also plead guilty to possession of less than one gram of marijuana. *Held*: The court's mistaken reference was a mere *lapsus linguae* and did not prejudice the defendant.

**2. Criminal Law § 167—prejudicial error in trial—burden of proof**

The burden is on defendant not only to show error but also to show that the error complained of was prejudicial to him, the presumption being in favor of the regularity of the trial.

**3. Criminal Law § 167—technical error—prejudicial error**

Technical error alone will not entitle defendant to a new trial; it is necessary that the error be material and prejudicial and amount to a denial of some substantial right.

**4. Constitutional Law § 36—cruel and unusual punishment**

Punishment is not regarded as cruel and unusual in this State if it is within the limits prescribed by the General Assembly.

APPEAL by defendant from *Tillery, Judge*, 14 June 1971  
Criminal Session of Superior Court held in EDGECOMBE County.

This is a companion case to #717SC759, *State v. Cadora*, filed this same date.

Defendant was charged under separate bills of indictment with possession of burglary tools in violation of G.S. 14-55 and felonious breaking and entering in violation of G.S. 14-54(a). He entered a plea of guilty to the charge of possession of burglary tools, and as to the other charge, he tendered a plea of guilty to the lesser included offense of attempted breaking and entering.

After examining defendant at length concerning the voluntariness of his pleas of guilty, the court adjudicated that the pleas were freely, understandingly and voluntarily made and ordered that they be entered in the record. The cases were consolidated for judgment and an active prison sentence of seven to ten years was imposed.

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State v. Ruiz

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*Attorney General Morgan by Associate Attorney Conely for the State.*

*George A. Goodwyn for defendant appellant.*

GRAHAM, Judge.

[1] The record indicates that after questioning defendant under oath concerning the voluntariness of his pleas, and while entering an adjudication with respect to the pleas, the court stated, among other things, that defendant "*plead guilty to possession less than one gram of marijuana, possession of burglary tools, attempted breaking and entering. . . .*" (Emphasis added.) Defendant assigns this as error.

Defendant was not charged with possession of marijuana, and of course he entered no plea of guilty to any such charge. In companion cases, Charles Robert Cadora entered pleas of guilty to possession of burglary tools, attempted breaking and entering and possession of less than one gram of marijuana. The two men were apprehended together and their cases were called together. The three charges against Cadora undoubtedly prompted the *lapsus linguae* whereby the court stated that this defendant had pleaded guilty to three charges.

While the court's statement was erroneous insofar as it attributed to defendant a plea of guilty to the offense of possessing less than one gram of marijuana, we fail to see that any prejudice resulted. The question propounded by the court in inquiring into the voluntariness of defendant's pleas clearly show that the court was aware that defendant had pleaded guilty only to the two offenses charged. Also, judgment was entered only as to these two offenses. Defendant does not now contend that his pleas of guilty to these offenses were not freely, understandingly and voluntarily made, or that the court's adjudication to this effect was erroneous. The transcript of the pleas, which is set out in the record, supports the court's adjudication.

[2, 3] The burden is on defendant not only to show error but also to show that the error complained of was prejudicial to him, the presumption being in favor of the regularity of the trial. *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688. Technical error alone will not entitle defendant to a new trial; it is neces-

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sary that the error be material and prejudicial and amount to a denial of some substantial right. *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406; *State v. Griffin*, 5 N.C. App. 226, 167 S.E. 2d 824.

Defendant's second contention is that the bill of indictment charging him with the possession of burglary tools fails to set forth facts sufficient to constitute a criminal offense. This same contention was made with respect to an identical bill of indictment in the companion case of *State v. Cadora*. (See opinion of Mallard, Chief Judge, filed this date.) On the authority of that case this assignment of error is overruled.

[4] Finally, defendant contends that the sentence of seven to ten years imprisonment constitutes cruel and unusual punishment. Punishment is not regarded as cruel and unusual in this State if it is within the limits prescribed by the General Assembly. *State v. Williams*, 279 N.C. 515, 184 S.E. 2d 282 (filed 10 November 1971); *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345; *State v. Cadora*, *supra*. The punishment here imposed was within the limits prescribed by the General Assembly.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. CLARENCE THOMAS WATSON

No. 7110SC750

(Filed 15 December 1971)

1. Receiving Stolen Goods § 5—sufficiency of the State's evidence

Issue of defendant's guilt of the offense of receiving a stolen television set was properly submitted to the jury.

2. Receiving Stolen Goods § 1—elements of the offense—knowledge that the goods were stolen

Knowledge by the accused that the goods were stolen is an essential element of the offense of receiving stolen goods.

3. Receiving Stolen Goods § 6—instructions—guilty knowledge of defendant

In a prosecution for receiving a stolen television set, an instruction which would allow the jury to find defendant guilty of the offense

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*State v. Watson*

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without finding beyond a reasonable doubt that the defendant had knowledge that the set had been stolen, *held* prejudicial error.

APPEAL by defendant from *Hobgood, Judge*, 19 July 1971 Criminal Session of Superior Court held in WAKE County.

The defendant Clarence Thomas Watson was charged in a three-count bill of indictment, proper in form, with felonious breaking and entering, felonious larceny and feloniously receiving stolen goods, in violation of G.S. 14-54(a), 14-72(b) (2) and 14-71.

Upon the defendant's plea of not guilty, the State offered evidence tending to show: During the month of February 1971, a Sears' color television with a value in excess of \$200 was stolen from the home of Professor Raymond L. Murray in Wake County, North Carolina. On 8 February 1971, the defendant went to the IGA Grocery Store, Route 2, Wendell, North Carolina, where he asked the proprietor, Raymond Massey, if he would be interested in buying a television. The defendant and Raymond Massey left the IGA Grocery Store, got in an automobile driven by defendant's son, Roger Watson, and went approximately a half mile off the road down in a field to a tobacco barn. The defendant and his son, Roger Watson, got out of the car and opened the trunk. The Sears' color television stolen from Professor Murray was in the trunk. The defendant, his son, and Raymond Massey were the only persons who got out of the automobile. Massey agreed to buy the television set for \$100. The defendant said his son wanted to sell the television because he needed the money. The three men got back in the car and returned to the store, where Massey paid Roger Watson, in the presence of the defendant, \$100 for the television set.

The defendant testified in his own behalf that he had never been to Professor Murray's home nor had he ever stolen anything belonging to Mr. Murray. He testified that his son, Roger Watson, told him he had bought a television set and that he wanted to see if he could sell it. The defendant testified that he went to Mr. Massey's store and asked him to come out to the automobile to see his son. The defendant denied that he asked Mr. Massey if he wanted to buy a television set and denied that he sold him a television set. The defendant's son, Roger Watson, testified that the day before the defendant's

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State v. Watson

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trial he had pleaded guilty to breaking and entering the home of Professor Raymond L. Murray and larceny in that home.

The jury found the defendant not guilty of the counts charging breaking and entering and larceny, and guilty of feloniously receiving stolen goods. From a judgment imposing a prison sentence of five years, the defendant appealed.

*Attorney General Robert Morgan and Assistant Attorney General Richard N. League for the State.*

*McDaniel and Fogel by Sheldon L. Fogel for defendant appellant.*

HEDRICK, Judge.

[1] The defendant assigns as error the court's denial of his motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. The essential elements of the offense of receiving stolen goods are the receiving of goods which had been feloniously stolen by some person other than the accused, with knowledge by the accused at the time of the receiving that the goods had been theretofore feloniously stolen, and the retention of the possession of such goods with a felonious intent or with a dishonest motive. *State v. Tilley*, 272 N.C. 408, 158 S.E. 2d 573 (1968). The evidence considered in the light most favorable to the State, and giving it the benefit of every reasonable inference to be deduced therefrom, is sufficient to require the submission of the case to the jury on the count charging the defendant with feloniously receiving stolen goods.

The defendant assigns as error the following portion of the court's final mandate to the jury:

"So, I charge you if you find from the evidence and beyond a reasonable doubt that about the 8th day of February, 1971, the defendant Clarence Thomas Watson with a dishonest purpose did receive the color television set, the property being the property of Raymond L. Murray worth more than \$200.00, which you believe someone else had stolen it would be your duty to return a verdict of feloniously receiving stolen goods. However, if you do not so find or have a reasonable doubt as to any one or more of these

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State v. Watson

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things, you will return a verdict—you will not return a verdict of guilty of feloniously receiving stolen goods.”

[2, 3] Knowledge by the accused that the goods were stolen is an essential element of the offense of receiving stolen goods. *State v. Tilley, supra*. The challenged instruction would allow the jury to find him guilty of feloniously receiving the stolen television without its finding beyond a reasonable doubt that the defendant knew the Sears’ color television set had been stolen. The judge’s failure to instruct the jury that in order to convict the defendant of receiving stolen goods they must find beyond a reasonable doubt that the defendant knew that the television set had been stolen, plus the judge’s inadvertent statement, “which you believe someone else had stolen,” coming as it did in the court’s final mandate to the jury, must be held to constitute prejudicial error, entitling the defendant to a new trial.

We do not discuss the defendant’s additional assignments of error since they are not likely to occur on a retrial.

New trial.

Chief Judge MALLARD and Judge GRAHAM concur.

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State v. Fuller

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## STATE OF NORTH CAROLINA v. JIMMY FULLER

No. 7122SC726

(Filed 15 December 1971)

## 1. Larceny § 4— warrant or indictment — description of goods stolen

The description in a larceny warrant or bill of indictment of the goods allegedly stolen is sufficient if from it defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and the court is enabled on conviction to pronounce sentence according to law.

## 2. Larceny § 4— indictment — description of stolen property

Larceny indictment in which property allegedly stolen from a grocery store was itemized in twenty-six classifications described the stolen property with sufficient certainty.

APPEAL by defendant from *Beal, Judge*, 3 May 1971 Session of Superior Court held in DAVIDSON County.

Defendant was charged in a three count bill of indictment with (1) felonious breaking or entering, (2) felonious larceny, and (3) feloniously receiving stolen goods knowing them to have been feloniously stolen. Only the first and second counts were submitted to the jury.

State's evidence tended to show the following. In response to a call two Lexington police officers went to the vicinity of Abernathy's Grocery in the early morning hours of 21 March 1970. Defendant was across the street from Abernathy's Grocery with two bags in his arms. Upon the officers' command to halt defendant placed the bags on the sidewalk and continued to walk away. Upon the officers' second command to halt defendant stopped and raised his hands. A window had been broken open at Abernathy's Grocery. A search of the bags and immediate area of the street disclosed numerous items including two pistols, a rifle, watches, candy, tools, cigarettes, gloves, and invoices which had been taken from Abernathy's Grocery. The total value of the items taken from the store exceeded seven hundred dollars.

Defendant's evidence tended to show the following. Defendant had just caught a ride from Salisbury to Lexington and was on his way home. His regular route home took him by Abernathy's Grocery. As he was passing the store, two boys

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State v. Fuller

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were walking in front of him. These two boys ran when the officers appeared and one of the officers fired two warning shots but did not pursue them. The defendant testified that he did not have two grocery bags in his arms. On cross-examination the defendant again testified that he had never seen any bags.

State's evidence tended to show that no person other than defendant was observed by the police in the area. The police did not try to get anyone but defendant to halt and they did not fire any warning shots at anyone.

The jury returned verdicts of guilty of felonious breaking or entering and guilty of felonious larceny. Defendant was sentenced to a prison term of eight years on the breaking and entering (first) count and a prison term of five years on the larceny (second) count, to commence at the expiration of the term imposed on the first count. Defendant appealed.

*Attorney General Morgan, by Assistant Attorney General Chalmers, for the State.*

*Joe H. Leonard for the defendant.*

BROCK, Judge.

Defendant assigns as error that the second count (felonious larceny) in the bill of indictment is fatally defective for failure to sufficiently describe the property allegedly stolen.

Defendant cites *State v. Nugent*, 243 N.C. 100, 89 S.E. 2d 781, and *State v. Ingram*, 271 N.C. 538, 157 S.E. 2d 119, in support of his argument. In *Nugent* the description of the property was a "quantity of meat of the value of fifteen hundred dollars, of the goods, chattels and moneys of one R & S Packing Company." In *Ingram* the description of the property was "the merchandise, chattels, money, valuable securities and other personal property, located therein, of the value of \$878.25 of the goods, chattels and money of the said Henry J. Thomas." Clearly in the *Nugent* and *Ingram* cases the defendant was unable to know what property he was accused of stealing.

[1] The description in a warrant or bill of indictment of the goods alleged to have been stolen is sufficient if from it defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a

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bar to subsequent prosecution for the same offense, and the court is enabled, on conviction, to pronounce sentence according to law. See G.S. 15-153; *State v. Strickland*, 243 N.C. 100, 89 S.E. 2d 781; 50 Am. Jur. 2d, Larceny, § 124, p. 300.

[2] In the present case the property alleged to have been stolen was itemized in twenty-six classifications and described with sufficient certainty that there could be no reasonable misunderstanding by the defendant, the jury, or the court with regard to what property defendant was accused of stealing, and will permit defendant to plead this conviction as a bar to another prosecution for the same offense.

We have carefully examined defendant's remaining assignments of error and find them to be without merit.

No error.

Judges BRITT and VAUGHN concur.

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STATE OF NORTH CAROLINA v. ELI COMBS, JR.

No. 7123SC654

(Filed 15 December 1971)

Automobiles §§ 120, 129— definition of "under the influence"

Trial court's definition of under the influence of intoxicating liquor, "The defendant by reason of having drunk some intoxicating beverage had lost the normal control of the powers or functions of his body or mind to such an extent that such loss could be estimated or recognized," held proper. G.S. 20-138.

APPEAL by defendant from *Exum, Judge*, 21 June 1971 Session of Superior Court held in WILKES County.

Defendant was charged with the offense of operating a motor vehicle upon a public highway while under the influence of intoxicating liquor in violation of G.S. 20-138. He was found guilty in the District Court and appealed to the Superior Court. Defendant was tried *de novo* before a jury in the Superior Court upon his plea of not guilty. The jury returned a verdict of guilty and defendant now appeals to this Court.

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State v. Combs

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*Attorney General Morgan, by Associate Attorney Byrd, for the State.*

*Moore & Rousseau, by Julius A. Rousseau, for the defendant.*

BROCK, Judge.

Defendant brings forward and argues one assignment of error. He argues that the trial judge failed to give to the jury a correct definition of the term "under the influence of intoxicating liquor."

Upon this question the trial judge instructed the jury as follows:

"What do we mean by under the influence of intoxicating liquor? That phrase means in law that the defendant by reason of having drunk some intoxicating beverage had lost the normal control of the powers or functions of his body or mind to such an extent that such loss could be estimated or recognized.

"I will go over that again.

"Under the influence of intoxicating liquor means that the defendant at the time and place in question had by reason of having drunk some intoxicating beverage lost the normal control of the powers or functions of his body or mind, or both, so that such loss could be estimated or recognized."

Defendant relies upon *State v. Carroll*, 226 N.C. 237, 37 S.E. 2d 688. In *Carroll* it is said that "... a person is under the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties." The opinion in *Carroll* was concerned with an instruction by the trial judge as follows: "Where a person has drunk a sufficient quantity of alcoholic liquor or beverage to affect, however slightly, his mind and his muscles, his mental and his physical faculties, then he is under the influence of intoxicating liquor or beverage." It is obvious that the phrase "however

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slightly" does not properly express the intent of G.S. 20-138, which makes it an offense to operate a motor vehicle on the public highway while under the influence of intoxicating liquor, and the Supreme Court pointed out in *Carroll* that the statute requires an "appreciable impairment" of one's normal control of his bodily or mental faculties, or both.

However, our Supreme Court has not decreed that the word "appreciable" is the only word capable of properly expressing the statutory intent. In *State v. Bowen*, 226 N.C. 601, 39 S.E. 2d 740, the use of the words "materially impaired" was held to be without error. In *State v. Lee*, 237 N.C. 263, 74 S.E. 2d 654, there was no error found in the use of the words "perceptibly impaired." In *State v. Peurifoy*, 251 N.C. 82, 110 S.E. 2d 445, there was no error found in the use of words "obvious impairment." In *State v. King*, 12 N.C. App. 568, 183 S.E. 2d 857, we held there was no error in the use of the words "estimated or recognized." Webster's Third New International Dictionary (1968) defines the word "appreciable" as follows: "capable of being perceived and recognized or of being weighed and appraised." J. I. Rodale, *The Synonym Finder* (1967) lists synonyms for the word "appreciable" as follows: "material enough to be recognized, large enough to be estimated, definite, noticeable, perceptible, discernible, estimable, ascertainable, visible, apparent, distinguishable, cognizable, perceivable, sensible, detectable, evident."

We hold that the instruction complained of properly expresses the intent of the statute and is in accord with the holding in *State v. Carroll*, *supra*.

No error.

Judges BRITT and VAUGHN concur.

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**State v. Worley**

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**STATE OF NORTH CAROLINA v. MELVIN WORLEY**

No. 717SC701

(Filed 15 December 1971)

**Infants § 7— contributing to delinquency of minor**

In a prosecution for contributing to the delinquency of a minor in violation of [former] G.S. 14-316.1, it was not necessary for the State to allege or prove that the child has become a delinquent child as defined in G.S. 7A-278(2).

**APPEAL** by defendant from *Tillery, Judge*, 19 April 1971 Session of Superior Court held in EDGECOMBE County.

Defendant was charged in a warrant with the offense of contributing to the delinquency of a minor on 15 January 1971 in violation of G.S. 14-316.1. He was found guilty in the District Court and appealed to the Superior Court where, upon his plea of not guilty, he was tried *de novo* by a jury.

Defendant is an adult male; he operates a fish market on Main Street in Tarboro, North Carolina, where he employs several persons; and he maintains a residence on St. James Street extension in or near Tarboro. Vernice Diane Lynch (Diane) is a female, age fourteen years, having been born 9 July 1956.

The State's evidence tends to show the following. On 3 December 1970 at about 8:30 p.m. defendant picked Diane up in his car and took her to his house. There were several boys and girls at defendant's house ranging in age from fourteen to twenty. They danced, talked, and drank wine. Defendant gave Diane some wine and later took her into his bedroom. He removed her clothes and they went to bed. Defendant had sexual intercourse with Diane twice that night. The next morning, 4 December 1970, he took her to her home to change clothes and then took her to school. Her parents had left for work and did not see Diane when she came home to change clothes. That afternoon defendant picked Diane up after school and she again spent the night with him at his house. Defendant had sexual intercourse with Diane twice during the night of 4 December 1970. On 5 December 1970, Diane spent the night with defendant at defendant's house. Again defendant had sexual intercourse with Diane twice during the night of 5 December 1970. On 6 December Diane returned to her home. On 14 January 1971 six boys picked Diane up at school. They pulled her into

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State v. Worley

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a car and took her to defendant's house. Defendant gave Diane some wine and then she went to bed with him and had sexual intercourse with him. At about one o'clock a.m. on 15 January 1971, a deputy sheriff of Edgecombe County went to defendant's house where he found defendant, Diane, two other boys, and two other girls.

The jury found defendant guilty as charged and judgment of confinement for a period of two years was entered. Defendant appealed.

*Attorney General Morgan, by Assistant Attorney General Icenhour, for the State.*

*Everett & Cheatham, by C. W. Everett, for the defendant.*

BROCK, Judge.

The portion of G.S. 14-316.1, as it was written before the 1971 rewrite thereof, which was pertinent to the charge against defendant read as follows: "... any . . . person who knowingly or wilfully is responsible for, or who encourages, aids, causes, or connives at, or who knowingly or wilfully does any act to produce, promote, or contribute to, any condition of delinquency or neglect of such child shall be guilty of a misdemeanor."

Defendant argues strenuously that his motion for nonsuit should have been granted because the State offered no evidence that Diane was a delinquent child as defined in G.S. 7A-278(2); therefore, he cannot be guilty of having contributed to her delinquency. This argument is almost as old as the statutory offense itself. However, the generally accepted view is that such statutes are preventive as well as punitive in nature and it is not necessary to allege or prove that the child in fact is, or has become, a delinquent. Annot. 18 ALR 3d 824. The North Carolina statute, partially quoted above, coincides with the general or majority view. The quoted statute condemns any person who encourages any condition of delinquency, any person who aids any condition of delinquency, any person who causes any condition of delinquency, any person who connives at any condition of delinquency, any person who does any act to produce any condition of delinquency, any person who does any act to promote any condition of delinquency, and any person who does any act to contribute to any condition of delinquency. The statute does

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State v. Robinson

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not require that the creation of a state of delinquency be accomplished. It seems clear that the legislative intent was to protect children from wrongful influence by adults, and that in protection of minors the State should not await the result of the wrong perpetrated before punishing the offender.

Defendant assigns as error portions of the instructions to the jury. It seems to us that the instructions were more favorable to defendant than is required. In our view the case was fairly submitted to the jury and no prejudice to defendant has been made to appear.

In this trial we find

No error.

Judges BRITT and VAUGHN concur.

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STATE OF NORTH CAROLINA v. HILDA RANKIN ROBINSON

No. 7112SC685

(Filed 15 December 1971)

1. Criminal Law § 164— motion for nonsuit — necessity for exception — review on appeal

The Court of Appeals reviews the sufficiency of the evidence to sustain the verdict in a criminal case, notwithstanding the defendant failed to make motions for nonsuit or directed verdict at the close of the State's evidence and at the conclusion of all the evidence. G.S. 15-173.1.

2. Narcotics § 4— possession of heroin — sufficiency of evidence

Issue of defendant's guilt of the possession of heroin was properly submitted to the jury.

3. Criminal Law § 168— instructions — review on appeal

The charge to the jury must be read as a whole and not in detached parts.

4. Criminal Law § 168— instructions — review on appeal

When the charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, although some of the expressions, when standing alone, might be regarded as erroneous.

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State v. Robinson

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ON *certiorari* to review a trial before *Bailey, Judge*, April 5, 1971 Session of CUMBERLAND Superior Court.

The defendant was charged in a bill of indictment with possession of heroin. At trial the defendant was found guilty by a jury and judgment was entered imposing a prison sentence. Defendant gave notice of appeal.

On July 13, 1971, the Solicitor moved to dismiss the appeal on the grounds that defendant had failed to serve the case on the Solicitor within the time allowed. The motion was granted and the appeal dismissed.

The defendant filed a Petition for Writ of Certiorari with this Court. The petition was allowed.

*Attorney General Robert Morgan by Assistant Attorney General I. Beverly Lake, Jr., for the State.*

*Anderson, Nimocks & Broadfoot by Stephen H. Nimocks for defendant appellant.*

CAMPBELL, Judge.

The defendant raises two questions on appeal:

1. Did the trial court commit error in denying defendant's motions for directed verdict at the close of the State's evidence and at the close of all the evidence?

2. Did the court commit error in its instructions to the jury?

[1, 2] An examination of the record before us reveals that defendant did not make any motions, either for nonsuit or for directed verdict, at the close of the State's evidence and at the conclusion of all the evidence. Nevertheless, pursuant to G.S. 15-173.1, we have reviewed the sufficiency of the evidence to sustain the verdict. *State v. Davis*, 273 N.C. 349, 160 S.E. 2d 75 (1968). We find that, when viewed in the light most favorable to the State, the evidence was sufficient to go to the jury and sustain a verdict against the defendant.

In brief summary the evidence for the State reveals that law enforcement officers armed with a search warrant went to the defendant's residence and after knocking on the door were admitted by a man who was in the house. On gaining admission

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State v. Sharpless

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the officers went through the house to a rear bedroom where the defendant was in the process of getting out of bed and putting on a housecoat. On the floor at the feet of the defendant they found fourteen capsules which, on subsequent laboratory examination, proved to be heroin. The defendant denied any knowledge of the capsules. The jury found the defendant guilty of possession of heroin.

The defendant next argues that the trial court committed prejudicial error in its charge to the jury. The exceptions to the charge are not properly set out in the record. Despite this, we have examined the charge to the jury with care.

**[3, 4]** The charge to the jury must be read as a whole and not in detached parts. *State v. Shaw*, 263 N.C. 99, 138 S.E. 2d 772 (1964). When the charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, although some of the expressions, when standing alone, might be regarded as erroneous. *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966). While there may be minor technical errors in the charge, when taken as a whole, it is accurate as to the law and fair to the defendant. The charge is free from prejudicial error.

In the entire trial we find,

No error.

Judges MORRIS and PARKER concur.

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STATE OF NORTH CAROLINA v. ODELL SHARPLESS

No. 718SC614

(Filed 15 December 1971)

**1. Larceny § 1— larceny from the person**

Larceny from the person is a felony without regard to the value of the property in question. G.S. 14-72(b).

**2. Larceny § 7— larceny from the person — sufficiency of evidence**

Issue of defendant's guilt of larceny from the person was properly submitted to the jury.

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State v. Sharpless

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APPEAL by defendant from *Cohoon, Judge*, 15 March 1971 Session of Superior Court held in LENOIR County.

Defendant pleaded not guilty to an indictment charging that on 7 August 1970 he "unlawfully, wilfully, and feloniously did make an assault on Hosea Dove and him in bodily fear and danger of his life did put, and \$85.00 in U. S. currency, of the value of \$85.00, from the person and possession of the said Hosea Dove then and there did unlawfully, wilfully, feloniously, forcibly and violently take, steal and carry away."

The State offered the evidence of Hosea Dove, who testified: On 7 August 1970 he was operating a filling station in Kinston; on that date he was acquainted with defendant and had known him for two or three years; about closing time on the night of 7 August 1970, between ten and eleven o'clock, defendant came into the station, got a drink and a cake, didn't say anything, but put a five dollar bill on the counter. Dove testified:

"I had sacked up my money for going home in a paper bag and had \$85.00 in the bag. I had to get the bag back out to make change and I started to reach in the bag to get the money to count it out for him to make change and he snatched the bag and ran. He ran out the front door and down Orion Street and I hollered and told him to stop, but he didn't stop but kept on running."

Defendant testified that he knew Dove, but had not seen him on 7 August 1970 and had never taken anything from him. Defendant and other defense witnesses testified that on the night of 7 August 1970 defendant had been with his girl and other friends at a tavern and at a dance club continuously from about 8 until about 12 o'clock and afterwards they had gone to another club.

In its charge the court submitted the case to the jury on the issue of defendant's guilt or innocence of the felony of larceny from the person. The jury found defendant guilty, and from judgment imposing a prison sentence of not less than six nor more than ten years, defendant appealed. Defendant having been adjudged to be an indigent, counsel was assigned to represent him.

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State v. Best

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*Attorney General Robert Morgan by Associate Attorney Thomas W. Earnhardt for the State.*

*Perry, Perry & Perry by Warren S. Perry for defendant appellant.*

PARKER, Judge.

[1, 2] We have carefully examined the entire record, considered all assignments of error, and find no error in the trial or in the sentence imposed. There was ample evidence to require submission of the case to the jury on the issue of defendant's guilt or innocence of the crime of larceny from the person, an offense included within the allegations of the indictment. Larceny from the person is a felony without regard to the value of the property in question, G.S. 14-72(b), and the evidence was not such as to justify submission of any issue as to misdemeanor larceny. The trial judge correctly instructed the jury as to defendant's alibi evidence, and the entire charge was free from prejudicial error. Defendant was ably represented at the trial and on this appeal by his assigned counsel. On conflicting evidence the jury has found against him. We find

No error.

Judges CAMPBELL and MORRIS concur.

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STATE OF NORTH CAROLINA v. NORWOOD E. BEST

No. 7111SC753

(Filed 15 December 1971)

1. Criminal Law § 99— trial judge's questioning of witness

A trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony.

2. Criminal Law § 117— instructions — scrutiny of defendant's testimony

It was proper for the trial court to instruct the jury to scrutinize the defendant's testimony in the light of his interest in the outcome of the case, and that if they believed he was telling the truth they would give to his testimony the same weight they would give to the testimony of any other believable witness.

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State v. Best

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APPEAL by defendant from *Clark, Judge*, 16 August 1971 Criminal Session of Superior Court held in JOHNSTON County.

This is a criminal prosecution on a bill of indictment, proper in form, charging the defendant with the felony of a crime against nature, in violation of G.S. 14-177.

The State offered evidence tending to show that on 22 July 1971 the defendant, Norwood E. Best, at about 10:00 p.m., forced Roger Hagen, nineteen years of age, to accompany him into the woods near Hagen's home in the Town of Princeton, North Carolina. The defendant undressed and forced Hagen to undress and lie upon the ground, where the defendant then committed the criminal act charged in the bill of indictment.

The defendant testified that on the night of 22 July 1971 Hagen "walked up to me and asked me did I want to do something." The defendant testified that he knew what Hagen meant. The defendant testified: ". . . I am not doing it for nothing and he said how much are you going to charge? I told him \$10.00. He said he did not have it so he gave me \$6.00. I told him to wait there in the church yard until I came back. Then I went home and got in bed and Roger comes there and knocks on my window. He asked me could he come in the house and get in bed with me. I told him no. He stayed out there by the window for 30 minutes and then he left. I did not see him again that night."

The jury found the defendant guilty as charged in the bill of indictment. From a judgment imposing a prison sentence of not less than three nor more than five years, the defendant appealed.

*Attorney General Robert Morgan, Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Guy A. Hamlin for the State.*

*Corbett & Corbett by Albert A. Corbett, Jr., for defendant appellant.*

HEDRICK, Judge.

[1] By his one assignment of error the defendant contends the court expressed an opinion, in violation of G.S. 1-180, by asking questions of the witness Hagen and by the court's instructions

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State v. Mizelle

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to the jury as to how they would consider the defendant's testimony. It is a well settled rule in this State that a trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. *State v. Strickland*, 254 N.C. 658, 119 S.E. 2d 781 (1961); *Andrews v. Andrews*, 243 N.C. 779, 92 S.E. 2d 180 (1956); *Wilkins v. Turlington*, 266 N.C. 328, 145 S.E. 2d 892 (1966); *State v. Blalock*, 9 N.C. App. 94, 175 S.E. 2d 716 (1970). We have examined all of the questions asked of the prosecuting witness by the judge and find that they were clearly for the purpose of clarifying the testimony of the witness, and in no way did the questions asked, either singly or collectively, amount to an expression of opinion by the judge on the evidence in the case, in violation of G.S. 1-180, which was in any way prejudicial to the defendant.

[2] The defendant testified in his own behalf. The court in substance instructed the jury to scrutinize the defendant's testimony in the light of his interest in the outcome of the case, but that this did not mean that they were to reject his testimony, but that if they believed he was telling the truth they would give to his testimony the same weight they would give to the testimony of any other believable witness. This instruction was proper. 3 Strong, N. C. Index 2d, Criminal Law, § 117; *State v. Walker*, 6 N.C. App. 740, 171 S.E. 2d 91 (1969); *State v. Turner*, 253 N.C. 37, 116 S.E. 2d 194 (1960). This assignment of error is not sustained. The defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

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STATE OF NORTH CAROLINA v. ELLIS EARL MIZELLE

No. 716SC576

(Filed 15 December 1971)

Homicide §§ 23, 27— manslaughter case — instructions on proximate cause

A manslaughter prosecution is reversed for failure of the trial judge to give a sufficient instruction on proximate cause.

APPEAL from *Cowper, Judge*, 15 April 1971 Session of  
HERTFORD Superior Court.

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State v. Mizelle

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The defendant was tried pursuant to a bill of indictment charging him with manslaughter. To the charge the defendant entered a plea of not guilty. The jury returned a verdict of guilty and from a sentence of imprisonment with a recommendation of work release the defendant appealed.

The evidence on behalf of the State tended to show that about 9:00 o'clock p.m. on 16 January 1971, the defendant was operating a 1968 Ford automobile on Tunis Road going north in the direction of Tunis. The road is also known as Rural Paved Road #1402. The weather was clear, the road was dry, the area was unlighted and wooded. The posted speed limit was 35 m.p.h. The defendant was operating at a speed of approximately 50 m.p.h. The defendant was under the influence of an intoxicating beverage. The defendant came upon a Ford pickup truck which was unlighted and headed in a northerly direction in the traveled portion of the road in the lane of travel the defendant was on. The Ford pickup truck was being pushed off the road by William Thurman Willoughby of Ahoskie. Willoughby was the owner of the truck, and the truck at the time was being guided by Andrew Lee Flood. Willoughby was in an intoxicated condition. The defendant failed to see Willoughby and the truck in time to avoid striking them with his vehicle. The defendant did apply the brakes to his vehicle and caused it to leave skid marks on the surface road for approximately 28 feet before striking Willoughby and crushing him against the rear of the truck producing death.

*Attorney General Robert Morgan by Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Ladson F. Hart for the State.*

*Cherry, Cherry & Flythe by Joseph J. Flythe for defendant appellant.*

CAMPBELL, Judge.

The defendant makes numerous assignments of error in the trial, but since a new trial is being ordered on one assignment of error, we will refrain from discussing the others as they may not arise on a new trial.

The defendant assigns as error the failure of the trial judge to instruct the jury on proximate cause.

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Robinson v. Highway Comm. and Roberts v. Highway Comm.

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We think this assignment of error is well taken. The trial judge instructed the jury that if Willoughby's death "was the natural and probable result of" the defendant's acts, then a verdict of guilty of involuntary manslaughter would follow. This was all the definition of proximate cause given by the trial judge and apparently was taken from pattern jury instructions for criminal cases in North Carolina.

This instruction is not sufficient as it fails to inform the jury as to the element of proximate cause. "To hold a person criminally responsible for a homicide his act must have been a proximate cause of the death." *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155 (1930); *State v. Phelps*, 242 N.C. 540, 89 S.E. 2d 132 (1955); *State v. DeWitt*, 252 N.C. 457, 114 S.E. 2d 100 (1960).

Foreseeability is a requisite of proximate cause. We have previously pointed this out and ordered a new trial where a proper definition of proximate cause was not given in a civil action. *Keener v. Litsinger*, 11 N.C. App. 590, 181 S.E. 2d 781 (1971). It is all the more imperative that all of the necessary elements including a correct definition of proximate cause to be given in a criminal case.

New trial.

Judges MORRIS and PARKER concur.

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GARRETT CHARLES ROBINSON, EMPLOYEE v. NORTH CAROLINA  
STATE HIGHWAY COMMISSION, SELF-INSURER EMPLOYER

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MRS. PEARL ROBERTS, WIDOW AND ADMINISTRATRIX OF RICH-  
ARD LEE ROBERTS, DEC'D EMPLOYEE v. NORTH CAROLINA  
STATE HIGHWAY COMMISSION, SELF-INSURER EMPLOYER

No. 7128IC624 and No. 7128IC686

(Filed 15 December 1971)

1. Master and Servant § 56— workmen's compensation — causal relation  
between injury and employment

In order to recover for an injury under the Workmen's Compensation Laws, the claimant must prove that the injury was the result of an accident arising out of and in the course of his employment; the

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**Robinson v. Highway Comm. and Roberts v. Highway Comm.**

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words "out of" refer to the origin or cause of the accident and the words "in the course of" refer to the time, place and circumstances under which it occurred.

**2. Master and Servant § 62— workmen's compensation—injury while leaving work**

Injuries received by persons employed by the Highway Commission as mowing machine operators when their car went out of control as they were leaving work on a private road controlled and maintained by the Highway Commission and leading from the area where the employees reported to work *are held* to have arisen out of and in the course of their employment.

APPEAL by defendant from orders of the Full Industrial Commission filed 10 May 1971 and 2 August 1971.

Plaintiff Robinson and plaintiff's decedent Roberts (hereinafter called plaintiffs) were on 24 April 1970 employed by defendant at its "Craggy Hill" or "Pig Hill" complex in Buncombe County. Both Robinson and Roberts were assigned to the Landscape Department. Other of defendant's departments, such as the Resident Engineer's Office, a sign shop, a salt bin, and the Maintenance Operations area were also located in the complex. Robinson and Roberts reported to work daily at 8:00 a.m. at the Landscape Department and from there would go about their appointed rounds of cutting grass along highways in the area. Both would return in the afternoon in time to leave by 4:30 p.m. The Landscape Department buildings were enclosed on three sides by fencing and on the fourth side by a steep bank. A gravel driveway provided access to the fenced-in area from the paved Pig Hill Road. Robinson and several other employees regularly rode to and from work with Roberts and paid him \$8.00 per month for this convenience.

North Carolina Highway 191 is the major public thoroughfare adjacent to the complex. In order to reach the Landscape Department one must turn off N.C. 191 and follow a 14' wide paved road approximately 1000 feet to the summit of Pig Hill. Plaintiffs, on a normal working day, would descend from the Landscape Department area, via Pig Hill Road, at least twice—once in the morning when bringing the mower down, and once in the afternoon on the way home. At the bottom of this road is an intersection known as "Five Points." One of the roads from this intersection leads to the Craggy Prison Complex which property is adjacent to that controlled by defendant. The road leading to

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Robinson v. Highway Comm. and Roberts v. Highway Comm.

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the Landscape Department is on the property assigned to defendant and is controlled and maintained by defendant for the use of its employees and other individuals having business to conduct with defendant. It is not a part of the State Highway Commission's secondary or primary road system. This road is rather steep, having a grade of between twelve to fifteen percent in places.

On the afternoon of 24 April 1970 Robinson and Roberts returned to the Landscape Department atop Pig Hill after completing their daily tasks. They and two other employees entered Roberts' car for the trip home. After they traveled about 300 feet down Pig Hill, Roberts, the driver of the car, lost control of the speed of his vehicle. The vehicle ran down an embankment and came to rest against the paint shop. As a result of the accident Robinson suffered serious bodily injuries and Roberts was killed.

Plaintiffs filed notice of a claim for Workmen's Compensation benefits. Both cases were heard before Deputy Commissioner A. E. Leake in Asheville, North Carolina, at different times, and on 6 January 1971 an opinion and award was filed in favor of Robinson. On 4 June 1971 a similar opinion and award was filed in favor of the administratrix of the estate of Richard Lee Roberts. Defendant appealed both awards to the Full Industrial Commission. On 10 May 1971 the Full Commission affirmed the award to Robinson and on 2 August 1971 the award to Roberts' administratrix was likewise affirmed. Defendant appealed. In light of the fact that the circumstances surrounding the accident and the law to be applied in each case are the same, the cases were consolidated for consideration and determination on appeal.

*Williams, Morris and Golding by James W. Williams for plaintiff appellee Robinson.*

*Van Winkle, Buck, Wall, Starnes and Hyde by Roy W. Davis, Jr., for plaintiff appellee Roberts.*

*Attorney General Robert Morgan by Staff Attorney Richard B. Conely for defendant appellant.*

VAUGHN, Judge.

[1, 2] In order to recover for an injury under Workmen's Compensation Laws in North Carolina, the claimant must

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McElrath v. Insurance Co.

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prove that the injury was the result of an accident arising out of and in the course of his employment. G.S. 97-2(6). "It is settled law in this State that the words 'out of' refer to the origin or cause of the accident, and that the words 'in the course of' refer to the time, place and circumstances under which it occurred." *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E. 2d 570. The injury and death in these cases fall within the exception to the general rule that injuries in travel to and from work are not compensable. See *Bass v. Mecklenburg County*, *supra*; *Bountiful Brick Co. v. Giles*, 276 U.S. 154, 72 L.Ed. 507; *Maurer v. Salem Co.*, 266 N.C. 381, 146 S.E. 2d 432; 99 C.J.S., Workmen's Compensation, § 234 and the numerous cases cited in the above references. We hold that the Industrial Commission did not err in its conclusion that the death of Roberts and injury to Robinson resulted from an accident arising out of and in the course of their employment.

Affirmed.

Judges BROCK and BRITT concur.

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NETTIE McELRATH v. STATE CAPITAL INSURANCE COMPANY

No. 7128DC705

(Filed 15 December 1971)

**1. Insurance § 130— fire insurance — proof of loss — waiver by fire insurer — sufficiency of evidence**

In an insured's action to recover under a policy of fire insurance for the destruction of her home by fire, the insured's evidence was sufficient to support a finding that the insurer waived the policy provision requiring proof of loss to be furnished within 60 days, where (1) the insured went to the insurer's agent, who had sold her the policy, and notified him of the loss; (2) the insured notified the insurer in writing of her loss; and (3) the insurer failed to furnish to the insured proof of loss forms. G.S. 58-31.1.

**2. Insurance § 115— fire insurance — insurable interests in property destroyed by fire — sufficiency of evidence**

The insured under a fire insurance policy offered sufficient evidence to show that she had an insurable interest in the premises destroyed by fire, where (1) the deed to the premises was in the name of the insured's husband, who had died intestate leaving the

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McElrath v. Insurance Co.

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insured and six minor children; and (2) the insured has been in possession of the property since that time, has paid all taxes, has kept the property insured, and has made all repairs.

APPEAL by defendant from *Winner, District Judge*, 19 May 1971 Session of District Court held in BUNCOMBE County.

This suit on a fire insurance policy was instituted on 2 June 1970 and was tried by the judge without a jury. Plaintiff alleged that the subject premises were destroyed by fire on 26 January 1970; that the premises were insured by defendant in a policy issued for three years from October 2, 1967 to October 2, 1970; that plaintiff had complied with all requirements of the policy and that the defendant refused to pay the loss. By answer defendant admitted the issuance of the policy but alleged that defendant had cancelled the policy prior to the date of the fire and that the policy was not in effect at the time of the loss. Defendant further alleged that plaintiff had failed to file proof of loss as required by the policy.

Plaintiff's uncontradicted evidence, was, in summary, as follows. The policy was in effect on the date of the fire and the current premium had been paid. The house was completely destroyed. She went to the office of defendant's agent, H. E. Garrett and Company, who had sold her the policy and personally notified them of the loss. She also wrote the defendant company in Raleigh and notified them of the loss. On the day of the fire she received written notice that her insurance had been cancelled. She heard nothing further from the company.

At the conclusion of plaintiff's evidence the defendant's motion for a directed verdict under Rule 41 was denied. Defendant offered no evidence and renewed its motion for a directed verdict which was denied. From judgment awarding plaintiff \$2,000.00, the face amount of the policy, defendant appealed.

*Wade Hall for plaintiff appellee.*

*Williams, Morris and Golding by William C. Morris, Jr., for defendant appellant.*

VAUGHN, Judge.

[1] Defendant contends that its motion for a directed verdict should have been allowed because plaintiff failed to prove that

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McElrath v. Insurance Co.

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she complied with the policy provision with respect to filing proof of loss within sixty (60) days following the fire. Defendant notified plaintiff that her policy had been cancelled. Defendant continued to maintain that position in its pleadings when it alleged that the policy had been cancelled prior to the loss and that the policy was not in effect on the date of the fire. "The law does not require one to do a vain thing." *Williams v. Insurance Co.*, 209 N.C. 765, 185 S.E. 21. Moreover, after plaintiff gave defendant written notice of the loss and personally notified defendant's agent, the company failed to furnish plaintiff proof of loss forms. G.S. 58-31.1 is as follows:

"When any company under any insurance policy requires a written proof of loss after notice of such loss has been given by the insured or beneficiary, the company or its representative shall furnish a blank to be used for that purpose. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss, upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character, and extent of the loss for which claim is made."

We hold that plaintiff's evidence is sufficient to sustain the court's finding and conclusion that defendant waived the policy provision requiring proof of loss to be furnished within sixty (60) days.

[2] Defendant contends that the court should have granted its motion for a directed verdict for the reason that plaintiff had no interest in the property capable of being insured. The deed to the property was in the name of plaintiff's husband who died intestate in 1946 leaving plaintiff and six minor children surviving. Since that date plaintiff has been in possession of and has exercised dominion over the property. She has paid all taxes, kept the property insured and made all repairs. There is no suggestion of fraud or that defendant assumed any risk it did not intend to assume when it issued the policy. "In general, it is well-settled law that a person has an insurable interest in the subject matter insured where he has such a relation or connection with, or concern in, such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termi-

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State v. McKinney

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nation, or injury by the happening of the event insured against.” *King v. Insurance Co.*, 258 N.C. 432, 128 S.E. 2d 849. Defendant’s assignments of error based on the contention that the plaintiff did not have an insurable interest in the property are overruled. We have considered all of defendant’s assignments of error which were brought forward. The judgment from which defendant appealed is affirmed.

Affirmed.

Judges BROCK and BRITT concur.

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STATE OF NORTH CAROLINA v. THURMAN MCKINNEY

No. 718SC553

(Filed 15 December 1971)

**1. Criminal Law § 89— corroborative testimony**

In this armed robbery prosecution, testimony by a State’s witness that a prior witness had told him at the crime scene “that the defendant was down there getting into a car” was properly admitted for the purpose of corroborating the testimony of the prior witness, the question of whether the testimony actually corroborated the prior witness being properly left to the jury.

**2. Criminal Law § 33; Evidence § 35— statement made as part of *res gestae***

Statement made by a witness contemporaneously with defendant’s escape from the scene of the crime that defendant was getting into a waiting car was competent as part of the *res gestae*.

APPEAL by defendant from *Cohoon*, Judge, 13 April 1971 Session of Superior Court held in WAYNE County.

Defendant was charged in a bill of indictment with feloniously taking \$373 from the presence of Christine Holloman with the use and threatened use of a .22-caliber pistol.

The State offered evidence tending to show the following: In the early morning of 31 December 1970 defendant entered a store operated by Mrs. Christine Holloman and purchased a coke and cookie. Mabel Coley was a customer in the store at the time. When Mrs. Coley left the store, defendant grabbed Mrs. Holloman, pulled a pistol, and told her to give him her

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State v. McKinney

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money. Mrs. Holloman escaped and ran to the house trailer back of the store where she told her son, Jesse Paul Holloman, what was happening. Defendant ran from the store with a money box containing \$370 and got into a car being operated by another person. Mrs. Holloman's son followed in his car and succeeded in stopping the car in which defendant was riding about a mile down the road. Defendant jumped from the car and escaped into the woods. He was later apprehended and identified.

Defendant offered no evidence.

The court submitted to the jury only the issue of defendant's guilt of the lesser included offense of larceny of property of a value in excess of \$200. The jury returned a verdict of guilty and judgment was entered on the verdict imposing an active prison sentence of ten years.

*Attorney General Morgan by Associate Attorney Earnhardt for the State.*

*W. Dortch Langston for defendant appellant.*

GRAHAM, Judge.

Defendant has expressly abandoned his assignment of error based upon exceptions to the court's refusal to allow his motions for judgment of nonsuit. His remaining assignments of error challenge the admission of certain testimony admitted for corroborative purposes, and a mention of this testimony by the trial judge in summarizing the evidence in his charge to the jury.

[1] The challenged testimony is a statement by the State's witness Jesse Paul Holloman that "I got in my car and drove out to the road and Mabel Coley told me that the defendant was down there getting in the car." Mabel Coley had previously testified; however, defendant contends that Holloman's statement did not corroborate any of her testimony and that it should have been excluded as hearsay evidence. The court instructed the jury to consider the statement only as corroborative evidence, if they found that it did corroborate. Thus, the question of whether the statement actually corroborated the testimony of Mabel Coley was properly left to the jury. We see no error in the admission of the statement as corroborative evidence.

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State v. Alexander and State v. Propst

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[2] Moreover, the statement complained of was competent as substantive evidence since it was part of the *res gestae*. "Exclamations or declarations spontaneously evolved by the event and relevant to the inquiry are a part of the *res gestae*, and testimony thereof is competent as an exception to the hearsay rule." 3 Strong, N.C. Index 2d, Evidence § 35, and cases cited." *State v. Goines*, 273 N.C. 509, 513, 160 S.E. 2d 469, 472.

The evidence indicates that Mrs. Coley saw defendant run from the store toward the waiting car, heard Mrs. Holloman calling excitedly to her son, and saw Mr. Holloman run toward his car. Mrs. Coley's statement to Mr. Holloman that defendant was getting in the waiting car was clearly a natural and spontaneous utterance, prompted by the excitement of the moment, and made contemporaneously with the defendant's escape from the scene of the alleged offense. As such, the statement was admissible.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. CHARLES WESLEY ALEXANDER

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STATE OF NORTH CAROLINA v. FREDERICK LEE PROPST

No. 7126SC742

(Filed 15 December 1971)

1. Robbery § 5— armed robbery — instructions

The trial court did not err in instructing the jury as to the meaning of the words "with the use or threatened use of any firearms or other dangerous implement or means."

2. Robbery § 5— failure to submit lesser included offenses

The trial judge in an armed robbery prosecution did not err in failing to submit to the jury the lesser included offense of assault.

*Certiorari* was allowed 20 September 1971 as substitute for an appeal from *Beal, Judge*, 29 March 1971 Session of Superior Court held in MECKLENBURG County.

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State v. Alexander and State v. Propst

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Defendants were charged in separate bills of indictment, proper in form, with the felony of armed robbery. The cases were consolidated for trial.

The evidence for the State tended to show that about three o'clock in the afternoon on 17 October 1970, the defendants, Alexander and Propst, armed with a .22 caliber pistol and by the use and threatened use thereof, took approximately \$69.00 from the cash register in the store, Lafayette Radio Electronics, Inc., on Pecan Avenue in Charlotte, where Jack Hawkins and William Lewis Meadows were working and forced Hawkins to give them \$70.00 of his own money. They then forced Hawkins and Meadows to lie on the floor, tied them up, and left.

Defendants offered evidence tending to show that on 17 October 1970, defendant Alexander was in Concord getting his mother's car repaired and was not in Charlotte. Defendant Propst offered evidence tending to show that on the afternoon of 17 October 1970, he was at his home in Concord watching a basketball game and was not in Charlotte. Both defendants offered evidence tending to show that they did not participate in the crime charged.

The defendants entered pleas of not guilty. The jury returned a verdict against each defendant of guilty of armed robbery. From judgment of imprisonment, each defendant gave notice of appeal to the Court of Appeals.

*Attorney General Morgan and Associate Attorney Ricks for the State.*

*Charles V. Bell for defendant appellants.*

MALLARD, Chief Judge.

[1] Defendants contend that the trial judge committed error in charging the jury with respect to the law as to the meaning of the words "with the use or threatened use of any firearms or other dangerous implement or means." When the charge is considered as a whole, as we are required to do, we think that the instructions of the court with respect to the law were adequate and that no prejudicial error appears.

[2] Defendants also contend that the trial judge should have submitted to the jury the lesser included offense of assault and

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State v. Hunt

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cite the provisions of G.S. 15-169 as authority for their contention. G.S. 15-169, in pertinent part, reads as follows:

“On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicated, *if the evidence warrants such finding . . . .*” (Emphasis added.)

In the instant case, all of the State's evidence tended to show the commission of an armed robbery. The alibi evidence of the defendants tended to show that they were at some other place at the time of the robbery and could have committed no crime at the time and place alleged. The trial judge is not required to submit to the jury a lesser included offense unless there is evidence thereof. *States v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971); *State v. Terry*, 278 N.C. 284, 179 S.E. 2d 368 (1971); *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966); *State v. Hatcher*, 9 N.C. App. 352, 176 S.E. 2d 401 (1970); *State v. McLean*, 2 N.C. App. 460, 163 S.E. 2d 125 (1968). Evidence of a lesser included offense is lacking in this case. The trial judge did not commit error in failing to instruct the jury that they could return a verdict against the defendants of assault.

No error.

Judges HEDRICK and GRAHAM concur.

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STATE OF NORTH CAROLINA v. HENRY LEE HUNT

No. 7116SC767

(Filed 15 December 1971)

**Robbery § 5— instructions — weapons carried by the robbers**

In this armed robbery prosecution, statement made by the court during recapitulation of the State's evidence that “the shotgun and pistol which were taken *in* Mr. Prevatte's store are the same guns held by the men who came in his store” did not constitute an instruction that a shotgun and pistol were stolen *from* the store, the clear meaning of the statement being that the robbers carried a shotgun and pistol into the store to commit the robbery.

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State v. Hunt

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ON *certiorari* from *Canaday, Judge*, March 1971 Session of ROBESON Superior Court.

The defendant was tried on three indictments charging him and two others with armed robbery.

At the trial, the State's evidence tended to show that on 27 November 1970 Mr. Henry Prevatte was closing his filling station and grocery store at approximately 8:20 p.m.; that there were two other men in the store with him; that three men entered the store and informed him that "[t]his is a holdup"; that one of the men carried a shotgun and another had a pistol; that one of the men was the defendant, Henry Lee Hunt; and that the three men took with them Mr. Prevatte's .32 caliber pistol, money from the cash register and also money from Mr. Prevatte and from each of the two men in the store.

The defendant introduced evidence tending to establish an alibi.

The jury returned verdicts of guilty on all three indictments as to defendant Henry Lee Hunt. Judgment was entered on each indictment imposing prison sentences.

From this verdict and judgment, the defendant appeals.

*Attorney General Robert Morgan by Associate Attorney General Charles A. Lloyd for the State.*

*Neill A. Jennings, Jr., for defendant appellant.*

CAMPBELL, Judge.

The defendant assigns as the sole error of the trial tribunal a statement included in the charge to the jury.

In recapitulating the State's evidence, the judge stated:

"That the shotgun and pistol which were taken in Mr. Prevatte's store are the same guns held by the men who came in his store."

The defendant contends that when the judge stated, "[t]hat the shotgun and pistol which were taken in Mr. Prevatte's store are the same guns held by the men who came in his store," he was stating a material fact not in evidence and therefore committing prejudicial error. The defendant argues

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State v. Hunt

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that this sentence should be interpreted to mean that a shotgun and a pistol were taken *from* Mr. Prevatte's store and that there is no evidence of that fact. The defendant argues that the judge was in effect instructing the jury that a shotgun was stolen from the store.

The defendant's interpretation of the judge's charge is strained, at the least. We cannot accept it.

In examining the trial court's charge, we must read it as a whole, in the same connected way that it was given to the jury. *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966).

The word "take" and the word "in" when used alone are susceptible of many meanings and shades of meaning. See Webster's Third New International Dictionary (1968). The context is determinative of the precise meaning conveyed in a given case. In examining the entire charge, we find that the judge stated that, "Mr. Prevatte heard glass break, saw a man with a pistol" and, "[t]hat another man came in, had a shotgun in his hand." Both of these statements precede that part of the instruction which the defendant assigns as error. The judge also charged that a Smith and Wesson pistol and an amount of money were stolen from the store. No mention was made of any shotgun being stolen.

In light of the judge's instruction that the men entered with weapons and that only a pistol and cash were stolen, we can see no way in which a jury could have inferred that a shotgun had been stolen.

The clear meaning of the words in question is that the robbers carried a shotgun and pistol into the store to commit their crime. These two weapons were introduced in evidence after proper identification. There is ample evidence to support this statement in the charge of the judge.

Affirmed.

Judges MORRIS and PARKER concur.

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State v. Cox

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STATE OF NORTH CAROLINA v. THOMAS SPENCER COX

No. 711SC574

(Filed 15 December 1971)

**Criminal Law § 149— appeal by State— refusal to revoke suspension of sentence**

The State could not appeal from the trial court's determination that a suspended sentence given defendant to begin at the expiration of active sentences had not yet begun and that the suspension of the sentence could therefore not be revoked. G.S. 15-179.

APPEAL by the State from *Peel, Judge*, April 1971 Session of Superior Court held in CHOWAN County.

At a session of Superior Court of Chowan County held on 1 April 1969 presided over by Judge Joseph W. Parker, defendant pleaded guilty in three criminal cases in which he was charged with having committed the following offenses: (1) Case No. 69-Cr-39, unlawful possession of burglary tools; (2) No. 69-Cr-40(A), felonious breaking and entering; and (3) No. 69-Cr-40(B), safecracking. In the first case judgment was entered imposing on defendant an active prison sentence of not less than five nor more than eight years. In the second case defendant also received an active prison sentence of not less than five nor more than eight years, this sentence to run concurrently with the sentence which had been imposed in the first case. In the third case, judgment was entered as follows:

"On the count of safecracking, let the defendant be confined to State's Prison for a term of not less than ten years, nor more than 15 years, said sentence to begin at the expiration of sentence imposed in the count of breaking and entering, above 69-Cr-40(A). The foregoing sentence imposed for safecracking, to-wit: ten to 15 years, is suspended from the date of its commencement for a period of five years, on condition that the defendant violate no law of any State in the Union during said five year period."

While defendant was in prison serving the sentences of not less than five nor more than eight years which had been imposed upon him in the first two cases, the solicitor signed and caused to be served upon defendant a "Notice and Bill of Particulars," dated 21 April 1971, in which the solicitor notified defendant that he would pray for judgment placing into effect

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State v. Sherman

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the suspended sentence, and alleged that defendant had violated the terms of the suspension by committing the crime of perjury while testifying under oath at a Post-Conviction Hearing of another prisoner which was held in Perquimans County on 15 April 1971.

This matter was heard before Judge Peel, who entered judgment dated 8 May 1971, finding the foregoing facts, and concluding as a matter of law that the suspended sentence of the defendant had not begun on 15 April 1971, and for that reason the suspension of the sentence could not be revoked on the showing set out in the solicitor's Notice and Bill of Particulars. From judgment dismissing the Notice and Bill of Particulars, the State gave notice of appeal to the North Carolina Court of Appeals.

*Attorney General Robert Morgan by Associate Attorney General William Lewis Sauls for the State.*

*William Brumsey III for defendant appellee.*

PARKER, Judge.

Where judgment has been given for the defendant in a criminal action, an appeal may be taken by the State only in those instances specified in G.S. 15-179. *State v. Vaughan*, 268 N.C. 105, 150 S.E. 2d 31. The present case is not one of them.

Appeal dismissed.

Judges CAMPBELL and MORRIS concur.

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STATE OF NORTH CAROLINA v. EARL J. SHERMAN

No. 714SC649

(Filed 15 December 1971)

**Narcotics § 5— possession of heroin**

Where no exceptions or assignments of error are made and no error appears on the face of the record in this appeal from a conviction of unlawful possession of heroin, the judgment must be sustained.

APPEAL by defendant from *Fountain, Judge*, 6 April 1971 Session of Superior Court, ONSLOW County.

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State v. Sherman

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Defendant was charged under an indictment, proper in form, with possession of heroin in violation of G.S. 90-88. Through his court-appointed attorney, defendant entered a plea of not guilty. The evidence for the State tends to show that defendant had been lessee of apartment 612-G at the Belle View Apartments in Jacksonville, North Carolina, for a short time prior to 24 December 1970, and that about 9:30 p.m. on 24 December 1970, W. C. Barkley and two other men, acting as undercover agents, went to defendant's apartment. Before going there, Barkley had been provided with two ten dollar bills whose serial numbers had been recorded. In the presence of the defendant and two women, Barkley asked if they could buy heroin. One of the women, Jenny Waggoner, left the room and returned with two packets which she sold to Barkley. The price was \$12 and Barkley gave her the two ten dollar bills which had been identified at the police station earlier. Jenny Waggoner gave the two ten dollar bills to the defendant who put them in his pocket and gave her \$8. She in turn gave Barkley the \$8 change. The contents of the two packages was heroin. Police detective Jerry Reed stayed outside while Barkley and the two others were in defendant's apartment. Reed saw defendant come out of the apartment while Barkley and the others were inside and open the trunk of a black Thunderbird automobile, reach into the trunk, and then go back inside the apartment. Pursuant to a warrant issued the next day, defendant was arrested while sitting in the black Thunderbird automobile in front of 612-G Belle View Apartments. When arrested, one of the ten dollar bills with which Barkley had purchased the heroin was found on defendant's person.

The defendant testified on his own behalf that he had only lived in the apartment nine days, and three others including Jenny Waggoner also lived there. The defendant's evidence tends to show that on 24 December 1970 there were three or four men visiting Jenny Waggoner in the apartment whom he did not know; that he did make change for Jenny Waggoner that night; that no black Thunderbird automobile was parked in front of his apartment; and that he neither consented nor had knowledge of any heroin on the premises.

The jury returned a verdict of guilty, and defendant was sentenced to not less than three years nor more than five years in prison. Defendant appealed.

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State v. Robinette

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*Attorney General Morgan by Associate Attorney General Price for the State.*

*Edward G. Bailey for defendant appellant.*

MORRIS, Judge.

In his brief defense counsel candidly states that he is unable to discover any error of law in the trial or sentence. The record contains no exceptions and no assignments of error so the judgment must be sustained unless error appears on the face of the record. *State v. Higgs*, 270 N.C. 111, 153 S.E. 2d 781 (1967); *State v. Williams*, 268 N.C. 295, 150 S.E. 2d 447 (1966). We have carefully reviewed the entire record and find

No error.

Judges CAMPBELL and PARKER concur.

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STATE OF NORTH CAROLINA v. CARLEE W. ROBINETTE

No. 7122SC645

(Filed 15 December 1971)

**1. Automobiles § 129— drunken driving — instructions on intoxication**

In a prosecution for driving under the influence of intoxicants, the trial court did not err in instructing the jury that a person is under the influence of intoxicants when he has drunk a sufficient quantity thereof to lose the normal control of his mental or bodily faculties to such an extent that there is appreciable "or noticeable" impairment of one or both of those faculties.

**2. Automobiles § 129; Criminal Law §§ 32, 55— breathalyzer result — presumptions**

In a prosecution for drunken driving, the trial court properly instructed the jury that the presumption of intoxication raised under G.S. 20-139.1 by a breathalyzer test result of .27 was merely a permissive inference or *prima facie* evidence of intoxication and that, despite the results of the test, the jury was at liberty to acquit defendant if they found defendant's guilt was not proven beyond a reasonable doubt.

APPEAL by defendant from *Crissman, Judge*, 18 May 1971 Criminal Session of Superior Court held in IREDELL County.

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State v. Robinette

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Defendant was charged with operating a vehicle upon a highway while under the influence of intoxicating liquor in violation of G.S. 20-138. He was found guilty in the Recorder's Court of Iredell County and appealed to the superior court. From a verdict of guilty and entry of judgment thereon in the superior court, defendant appealed to this Court.

*Attorney General Robert Morgan by Assistant Attorney General T. Buie Costen for the State.*

*Collier, Harris and Homesley by Walter H. Jones, Jr., for defendant appellant.*

VAUGHN, Judge.

[1] In the course of defining "under the influence of intoxicating liquor" the court instructed the jury, in part, as follows:

"Our Court has said that a person is under the influence of some intoxicating beverage within the meaning of this statute when he has drunk a sufficient quantity of some intoxicating beverage to cause him to lose the normal control of his mental or bodily faculties, his mental or bodily capabilities, to such an extent that there is appreciable or noticeable impairment of either one or both of those faculties . . . ." (Emphasis ours.)

Defendant contends that the court's inclusion of the words "or noticeable" renders an otherwise satisfactory instruction so erroneous as to require a new trial. This assignment of error is overruled. See the opinion in *State v. Combs*, No. 7123SC654, filed in this Court this date, wherein Judge Brock reviews, among other cases, the case of *State v. Carroll*, 226 N.C. 237, 37 S.E. 2d 688, relied on by defendant. In *State v. Lee*, 237 N.C. 263, 74 S.E. 2d 654, the Court approved the use of the word, "perceptibly" instead of the word "appreciably." To paraphrase a statement by the Court in *Lee*, we fail to see in the word "noticeable" sufficient difference in meaning and common understanding from the rule given in *Carroll* as to constitute error.

[2] Defendant did not object to the admission of the result of the breathalyzer test, 0.27, which was administered to him within thirty or forty-five minutes of his arrest, but contends that the judge failed to correctly instruct the jury as to the presumption created by the statute, G.S. 20-139.1. We do not deem it

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State v. Phillips

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necessary to set out the instructions in detail. It is sufficient to say that His Honor clearly instructed the jury that the word "presumption" was used in the sense of a permissive inference, or *prima facie* evidence and that, despite the results of the test, the jury was at liberty to acquit defendant if they found his guilt was not proven beyond a reasonable doubt. *State v. Cooke*, 270 N.C. 644, 155 S.E. 2d 165. This assignment of error is overruled.

We have carefully considered all of defendant's assignments of error which were brought forward on appeal. In the trial we find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

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STATE OF NORTH CAROLINA v. DONNIE PHILLIPS

No. 7130SC755

(Filed 15 December 1971)

**1. Criminal Law § 23— appeal from guilty plea**

Defendant's appeal from a plea of guilty presents for review only the question of whether error appears on the face of the record proper.

**2. Criminal Law § 138— sentencing — alleged promise by probation officer**

The record does not support defendant's contention that prior to being sentenced upon his plea of guilty of forgery, an unnamed probation officer "expressed an opinion to defendant that if the defendant accepted an active sentence, defendant would not receive more than six months' imprisonment."

APPEAL by defendant from *Copeland*, Judge, 7 September 1971 Session of Superior Court held in GRAHAM County.

Defendant was charged with the felonies of forgery and uttering a forged check in the amount of \$38.67. When arraigned, the defendant was informed that upon a plea of guilty to the felony of forgery, he could be imprisoned for as much as ten years. The defendant, in writing, entered a plea of guilty of forgery as charged. After an examination of the defendant in open court, the trial judge made an adjudication that the

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State v. Phillips

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defendant's plea of guilty was freely, understandingly and voluntarily made.

From a judgment of imprisonment for a term of three years, the defendant appealed to the Court of Appeals.

*Attorney General Morgan and Associate Attorney Haskell for the State.*

*Leonard W. Lloyd for defendant appellant.*

MALLARD, Chief Judge.

[1] Defendant's appeal from his plea of guilty presents for review only the question of whether error appears on the face of the record proper. *State v. Roberts*, 279 N.C. 500, 183 S.E. 2d 647 (1971).

[2] The defendant in his assignment of error asserts that prior to being sentenced, an unnamed probation officer "expressed an opinion to the defendant that if the defendant accepted an active sentence, said defendant would not receive more than six (6) months imprisonment." This assignment of error is not supported by an exception entered in the record. Neither does the record on appeal filed in this case support such an assignment of error. Therefore, this assignment of error properly presents no question for review. *State v. Greene*, 278 N.C. 649, 180 S.E. 2d 789 (1971); *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970).

The appeal of the defendant presents only the record proper for review, and the record reveals that the trial judge made careful inquiry of the defendant as to the voluntariness of his plea after having adequately advised him of the consequences. Then the trial judge, upon competent and sufficient evidence, found and adjudicated that the defendant freely, understandingly and voluntarily entered a plea of guilty. See *State v. Hunter*, 279 N.C. 498, 183 S.E. 2d 665 (1971). No prejudicial error appears on the face of the record proper. The appeal is adjudged to be frivolous.

No error.

Judges HEDRICK and GRAHAM concur.

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State v. Little

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STATE OF NORTH CAROLINA v. LARRY LITTLE

No. 7118SC609

(Filed 15 December 1971)

**Criminal Law § 66— photographic and in-court identification**

Pretrial photographic procedure was not unnecessarily suggestive, and robbery victim's in-court identification of defendant was properly admitted in evidence.

APPEAL by defendant from *Kivett, Judge*, 3 May 1971 Session of Superior Court held in GUILFORD County.

Defendant was charged in a bill of indictment, proper in form, with the felony of robbery with the use of a dangerous weapon whereby the life of Anderson J. Parson was endangered or threatened. (G.S. 14-87).

State's evidence tends to show the following. On 3 January 1971, Anderson J. Parson (Parson) was employed to operate the B & B Poolroom on Powell Street in Greensboro, North Carolina. Defendant had been a customer of the poolroom for several months and was known to Parson by sight but not by name. When Parson closed for the day on 3 January 1971, he went to the Frank House for a couple of sandwiches. Parson saw defendant at the Frank House that evening. When Parson left the Frank House with the sandwiches, he went back to the B & B Poolroom to get some ale to carry home. As Parson was preparing to leave the poolroom, he was attacked by defendant and several unknown assailants. While his arms were pinned behind him, he was choked into unconsciousness with something which "felt like a piece of belt or rope." Defendant was standing in front of Parson striking him in the face with his fists. Defendant and the other assailants took \$85.00 or \$86.00 from Parson's pocket. Parson was hospitalized for several days.

Defendant's evidence tended to show the following. On the night in question he rode with several others to visit a friend in Lumberton, North Carolina. They visited the friend for a short time; then they rode to Clinton, North Carolina, for breakfast and a visit before returning to Greensboro. Defendant testified that he had been to the B & B Poolroom and had seen Parson working there, but that he had nothing to do with the robbery.

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State v. Little

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The jury returned a verdict of guilty as charged, and judgment of confinement for a period of not less than twelve nor more than sixteen years was entered. Defendant appealed.

*Attorney General Morgan, by Associate Attorney Lloyd, for the State.*

*Assistant Public Defender Shepherd for the defendant.*

BROCK, Judge.

Defendant argues that the trial judge committed error in allowing the victim's testimony which identified defendant as one of the assailants in the poolroom. Twenty-three pages of the record are devoted to an extensive *voir dire* conducted upon defendant's objection to the testimony. It clearly appears that the purpose of viewing the photographs in this case was merely to supply the police with defendant's name. Parson, the victim, knew defendant by sight but did not know his name. In any event, evidence on *voir dire* clearly refutes any indication of a suggestive procedure by the police. We hold that the trial judge was correct in admitting the evidence.

The Assistant Public Defender has tenaciously preserved numerous assignments of error to the admission of evidence and to the Court's instructions to the jury. However, in our view, no new or unusual legal question is raised and a seriatim discussion would serve no useful purpose. We have carefully reviewed all of defendant's assignments of error and find them to be without merit. In our opinion defendant received a full and fair trial, free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

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State v. Redfern

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STATE OF NORTH CAROLINA v. GEORGE LEE REDFERN

No. 7119SC706

(Filed 15 December 1971)

**Criminal Law § 34— cross-examination as to previous convictions**

Where defendant testified on cross-examination that he had previously been convicted of assault but that he did not know how many times, the trial court did not err in permitting the solicitor to question defendant about specific previous convictions dating back to 1945.

APPEAL by defendant from *Gambill, Judge*, April 26, 1971 Session of CABARRUS Superior Court.

The defendant, George Lee Redfern, was arrested on 15 January 1971 and charged with driving a vehicle while under the influence of intoxicating liquor, resisting arrest, and assaults on two deputies sheriff.

The charges were consolidated for trial. Defendant entered a plea of guilty to the charge of driving while under the influence of intoxicating liquor.

Pleas of not guilty were entered to the other three charges. The jury returned a verdict of guilty as charged. Judgment imposing a prison sentence was entered.

From the verdict and judgment, defendant appeals.

*Attorney General Robert Morgan by Assistant Attorney General Parks H. Icenhour for the State.*

*Irvin & Irvin by Howard S. Irvin for defendant appellant.*

CAMPBELL, Judge.

The sole question involved in this appeal is whether it was error for the trial court to allow the Solicitor to question the defendant, at some length, as to prior convictions.

At the trial defendant testified in his own behalf. On cross-examination the defendant testified that he had been convicted of assault, but that he did not know how many times. He was then questioned, at some length, about specific previous convictions dating to 1945.

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State v. Redfern

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The defendant contends that the State was bound by his answer that he had been convicted of assault, but he did not know how many times and that the Solicitor should not have been permitted to question defendant further concerning prior convictions.

When a defendant voluntarily becomes a witness, he may be cross-examined with respect to previous convictions, but the answers are conclusive and are admissible as affecting his credibility as a witness. *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied*, 400 U.S. 946 (1970). Whether the cross-examination goes too far or is unfair rests largely in the sound discretion of the trial judge. *State v. Neal*, 222 N.C. 546, 23 S.E. 2d 911 (1943). The defendant in this case admitted prior convictions, but did not recall the exact number. His contention that the Solicitor was bound by the answer and could not inquire further is without merit. Had the defendant denied any prior convictions he could not have been contradicted by independent evidence. *State v. King*, 224 N.C. 329, 30 S.E. 2d 230 (1944). Here, however, the defendant admitted the prior convictions. The Solicitor has the right to "sift the witness". *State v. Robinson*, 272 N.C. 271, 158 S.E. 2d 23 (1967). *State v. King, supra*.

The Solicitor's questions on cross-examination were proper. The trial court did not abuse its discretion in allowing the cross-examination.

We find

No error.

Judges MORRIS and PARKER concur.

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State v. Baldwin

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STATE OF NORTH CAROLINA v. WILLIAM BALDWIN

No. 7122SC752

(Filed 15 December 1971)

**Robbery § 4— sufficiency of evidence**

The State's evidence was sufficient for the jury in this armed robbery prosecution.

APPEAL by defendant from *Crissman, Judge*, 24 May 1971 Session of Superior Court held in IREDELL County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the armed robbery of Larry and Lola Shives.

This case was consolidated for trial in the superior court with the case of *State v. Larry Baldwin* which is the subject of a separate appeal. (See opinion in case no. 7122SC751 by Judge Graham, filed this date.) No objection to the consolidation appears in this record.

The evidence for the State tended to show that on 6 January 1971 defendant William Baldwin and his brother, Larry Baldwin, were transported from Charlotte to the place of business operated by Larry Shives and located east of Statesville on Highway 70. The defendant and his brother entered Shives' place of business at about 8:40 p.m. One of the said Baldwins put a knife to Mr. Shives' throat and threatened to kill him if he moved. Mr. Shives did move, and the other man struck him on the head, rendering him unconscious. Consciousness returned to Mr. Shives while one of the defendants was kicking him in the ribs. Mrs. Lola Shives, wife of Larry Shives, was present and the defendant and his brother beat her about the head, face and breast. The defendants took about \$3,900 from Mr. Shives and two pistols from the place of business.

Defendant offered evidence that tended to show that he was at some other place and could not and did not commit the alleged crime.

The defendant was found guilty of armed robbery. From a judgment of imprisonment, the defendant appealed to the Court of Appeals.

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State v. Williams

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*Attorney General Morgan and Assistant Attorney General Cole for the State.*

*Chamblee, Nash & Frank by T. Michael Lassiter for defendant appellant.*

MALLARD, Chief Judge.

There was ample evidence for the jury to find that the defendant and his brother, on the date alleged, robbed and brutally assaulted Mr. Larry Shives and his wife with "the use and threatened use of firearms, and other dangerous weapons." This appears to be simply another instance of an indigent defendant appealing because the State will have to pay for it.

We have carefully examined the record, and no prejudicial error appears. The appeal is adjudged to be frivolous.

No error.

Judges HEDRICK and GRAHAM concur.

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STATE OF NORTH CAROLINA v. JAMES ALEXANDER  
WILLIAMS, JR.

No. 7121SC606

(Filed 15 December 1971)

1. Criminal Law § 91— denial of continuance — witness located during trial

The trial court did not err in the denial of defendant's motion for a continuance made on the ground that defense counsel had just learned the name of a witness whose testimony was essential to the defendant, where the witness was located during the trial and testified for defendant.

2. Burglary and Unlawful Breakings § 5; Larceny § 7— refusal to set verdicts aside

The trial court did not abuse its discretion in the denial of defendant's motion to set aside as against the greater weight of the evidence verdicts of guilty of felonious breaking and entering and felonious larceny.

APPEAL by defendant from *Kivett, Judge*, 10 May 1971 Criminal Session of Superior Court held in FORSYTH County.

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*State v. Williams*

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Defendant was convicted on two charges of felonious breaking and entering and one charge of felonious larceny. Defendant gave notice of appeal and his court-appointed trial counsel was appointed to perfect his appeal to this Court.

*Attorney General Robert Morgan by Associate Attorney General Rafford E. Jones for the State.*

*Robert H. Sapp for defendant appellant.*

VAUGHN, Judge.

[1] Defendant's first assignment of error is that the court erred in failing to grant his motion for a continuance and that this amounted to a denial of rights guaranteed him under the constitutions of the State of North Carolina and the United States. Defendant was arrested on one of the warrants on 13 April 1971, the date of the alleged crimes. The other warrant was served on 15 April 1971. Defendant's attorney was appointed to represent him on 15 April 1971. A preliminary hearing was conducted before District Court Judge Clifford on 29 April 1971. The Grand Jury indictment was returned on 10 May 1971. The case was called for trial on 13 May 1971. Prior to pleading to the indictments, defendant's counsel moved for continuance on the grounds that he was not ready for trial and that he had just learned the name of a witness, Jesse Fowler, whose testimony would be essential to the defendant. Defendant's motion was denied. Court recessed for the day prior to the presentation of all the State's evidence. Defendant's witness, Jesse Fowler, was located the night of the 13th and conferred with defendant's counsel prior to the opening of court on the 14th. Fowler testified for defendant. In the light of the foregoing, defendant's argument that it was prejudicial error to deny his motion for continuance is without merit.

[2] Defendant's only other assignment of error is that the court erred in failing to grant his motion to set aside the verdicts in that they were contrary to the greater weight of the evidence. At trial defendant did not move for dismissal or nonsuit pursuant to G.S. 15-173. Whether the verdict should be set aside as contrary to the greater weight of the evidence is for determination by the trial judge in his discretion. No abuse of discretion has been shown. Even though at trial defendant failed to move pursuant to G.S. 15-173, on appeal we have re-

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State v. Carver

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viewed the sufficiency of the State's evidence as authorized by G.S. 15-173.1 and find it ample for submission to the jury. In the trial we find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

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STATE OF NORTH CAROLINA v. KENNETH CARVER

No. 7130SC754

(Filed 15 December 1971)

**1. Criminal Law § 158— assignment based on matters outside record**

An assignment of error based upon matters outside the record is improper and must be disregarded on appeal.

**2. Criminal Law § 138— sentencing — expression of opinion by probation officer**

Defendant's contention that prior to being sentenced upon his plea of guilty of forgery, a probation officer expressed an opinion to defendant that if defendant accepted an active sentence he would not receive more than six months' imprisonment, if true, would constitute no ground for relief on appeal.

APPEAL by defendant from *Copeland, Special Judge*, 7 September 1971 Regular Session of Superior Court held in GRAHAM County.

Defendant tendered a plea of guilty to a charge of forgery which was alleged in a bill of indictment proper in form. After examining defendant under oath concerning the voluntariness of his plea, the court adjudged the plea of guilty to have been freely, understandingly and voluntarily made and ordered it entered on the record. Judgment was entered sentencing defendant to serve not more than two years in the custody of the Commissioner of Corrections under the provisions of Article 3A, Chapter 148 of the General Statutes. Defendant appealed.

*Attorney General Morgan by Associate Attorney Haskell for the State.*

*Leonard W. Lloyd for defendant appellant.*

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State v. Carver

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GRAHAM, Judge.

No exceptions appear in the record. We have nevertheless examined the entire record and conclude that it contains no error. We hold the appeal to be frivolous.

Defendant does bring forward the following purported assignment of error:

"1. The defendant assigns as error the action of the Probation Officer during the interview with the defendant and prior to the sentencing of the defendant wherein the Probation Officer expressed an opinion to the defendant that if the defendant accepted an active sentence, said defendant would not receive more than six (6) months imprisonment."

[1] No conversation between defendant and the probation officer appears in the record. An assignment of error based upon matters outside the record is improper and must necessarily be disregarded on appeal. However, we do note that in his purported assignment of error, defendant does not contend that his conversation with the probation officer influenced his plea of guilty. (An affidavit filed by the solicitor indicates that a probation officer was asked to confer with defendant *after* defendant's plea of guilty had been entered and accepted.)

[2] Suffice to say, a defendant has no right to choose between an active sentence and probation, and even if the probation officer expressed an opinion to defendant as alleged in the purported assignment of error, it would constitute no grounds for relief.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

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State v. Young

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STATE OF NORTH CAROLINA v. ROGER W. YOUNG, ALIAS JAMES ROBINSON

No. 7126SC725

(Filed 15 December 1971)

1. Indictment and Warrant § 12; Larceny § 4—larceny prosecution—amendment of warrant

In a prosecution on a warrant charging defendant with the larceny of two dresses valued at \$155 from Belk Brothers Company, it was proper for the State to amend the warrant by inserting the words "a corporation" immediately following the words "Belk Brothers Company" and by inserting the word "felonious" between the words "the intent."

2. Criminal Law § 138—increased punishment in superior court—original trial in district court

Defendant's constitutional rights were not violated when he received greater punishment in the superior court than in the district court.

APPEAL by defendant from *McLean, Judge*, 9 August 1971 Schedule "B" Criminal Session of Superior Court held in MECKLENBURG County.

In the district court the defendant was placed on trial on a warrant charging, in part material to this appeal, as follows:

"... [O]n or about the 1st day of March, 1971, the defendant named above did unlawfully, wilfully, STEAL, TAKE, AND CARRY AWAY TWO LADIES' DRESSES, OF THE VALUE OF \$155.00, OF THE GOODS AND MERCHANDISE OF BELKS BROTHERS COMPANY, 115 E. TRADE STREET WITH THE INTENT TO APPROPRIATE SAME TO HIS OWN USE AND DEPRIVE THE LAWFUL OWNER OF SAME, IN VIOLATION OF G.S. 14-72 OF NORTH CAROLINA."

The defendant pleaded guilty and thereafter appealed from the judgment imposed in the district court.

When the case was called for trial in the superior court, the solicitor for the State, with leave of court, caused the warrant to be amended by inserting the words "a corporation" immediately following the words "BELKS BROTHERS COMPANY." The warrant was further amended by inserting the word "felonious" immediately following the word "THE" and immediately before the word "INTENT." The amendments were allowed over the objection of the defendant. The defendant thereupon entered

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Fishel and Taylor v. Church

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a plea of not guilty and was found guilty. The defendant appealed.

*Attorney General Robert Morgan by Associate Attorneys William Lewis Sauls and Christine A. Witcover for the State.*

*Lacy W. Blue for defendant appellant.*

VAUGHN, Judge.

[1] The defendant, through his court-appointed counsel, brings forward two assignments of error. Defendant's first argument is that the court erred in allowing the State to amend the warrant in the superior court and in failing to grant his motion to quash. "Under our practice, our courts have the authority to amend warrants defective in form and even in substance; provided the amended warrant does not change the nature of the offense intended to be charged in the original warrant." *Carson v. Doggett* and *Ward v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609. We hold that the court did not err in allowing the amendments to the warrant.

[2] Defendant also assigns as error the fact that he received greater punishment in the superior court than in the district court. For the reasons stated in *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897, this assignment of error is overruled.

No error.

Judges BROCK and BRITT concur.

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FISHEL AND TAYLOR, ARCHITECTS v. GRIFTON UNITED  
METHODIST CHURCH, AN UNINCORPORATED  
RELIGIOUS ASSOCIATION

No. 713SC533

(Filed 15 December 1971)

**Rules of Civil Procedure § 38—jury trial—written request—pleadings closed before effective date of Rules**

Where the pleadings in architects' action to recover for services rendered were closed prior to 1 January 1970, the effective date of the North Carolina Rules of Civil Procedure, and juries had been empaneled to try the case on two previous occasions since that date, the trial court erred in determining that defendant had waived the right to a jury trial under Rule of Civil Procedure No. 38 by failing to file a written request therefor. G.S. 1A-1, Rule 38.

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Fishel and Taylor v. Church

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*Certiorari* to review order of May, *Special Judge*, 24 May 1971 Session of Superior Court held in PITT County.

Plaintiff instituted this action on 22 September 1969. Defendant filed answer and counterclaim on 24 October 1969. The final pleading was plaintiff's reply filed 4 November 1969. The case came on for trial at the 14 March 1970 Session of Pitt County Superior Court. A jury was impaneled but before evidence was offered plaintiff's motion for judgment on the pleadings was allowed. On defendant's appeal to this Court the judgment was reversed by decision reported in 9 N.C. App. 224, 175 S.E. 2d 785. The case again came on for trial at the February 1971 Session of Pitt County Superior Court. The jury was unable to reach a verdict whereupon the presiding judge withdrew a juror and ordered a mistrial. On 24 May 1971, on plaintiff's motion, Judge May entered the order from which defendant appealed. In substance the order holds that defendant, never having filed a written request for a trial by jury, has waived the right to trial by jury under Rule 38 of the Rules of Civil Procedure and ordered defendant be denied the right of trial by jury. Defendant appealed.

*R. Mayne Albright for plaintiff appellee.*

*Wallace, Langley, Barwick and Llewellyn by F. E. Wallace, Jr., and James D. Llewellyn and White, Allen, Hooten and Hines by Thomas J. White, Jr., and John R. Hooten for defendant appellant.*

VAUGHN, Judge.

The parties do not raise nor do we decide the question of whether Judge May's interlocutory order was one from which appeal lies as a matter of right under G.S. 7A-27. We treat defendant's appeal as a petition for certiorari which is allowed. The pleadings in this case were closed prior to 1 January 1970, the effective date of the North Carolina Rules of Civil Procedure. Defendant had the right to trial by jury before the effective date of Rule 38. In fact two juries have been impaneled to try the case since the effective date of Rule 38. The esteemed trial judge erred in entering the order from which defendant appeals and the same is hereby reversed.

Reversed.

Judges BROCK and BRITT concur.

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State v. Cannady

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STATE OF NORTH CAROLINA v. WILLIAM CANNADY

No. 717SC682

(Filed 15 December 1971)

**Criminal Law § 75—**in-custody statements — written waiver of counsel — findings on indigency

The trial court erred in the admission of incriminating statements made by defendant without counsel on 5 December 1970, where defendant did not sign a written waiver of counsel and the trial court made no finding as to whether defendant was an indigent on that date. G.S. 7A-457.

APPEAL by defendant from *Cooper, Judge*, May 1971 Criminal Session of Superior Court held in WILSON County.

Defendant was indicted for murder. When the case was called for trial the solicitor announced that he would not seek a verdict of murder in the first degree but would seek a verdict of murder in the second degree or manslaughter. The jury returned a verdict of guilty of murder in the second degree. Defendant appealed.

*Attorney General Robert Morgan by Assistant Attorney General Richard N. League for the State.*

*Farris and Thomas by Robert A. Farris for defendant appellant.*

VAUGHN, Judge.

Although this case was tried before the decision in *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561, which interpreted portions of Article 36 of Chapter 7A of the General Statutes, its disposition is controlled by that case.

As a result of information received at the scene of the crime an extensive search was instituted for the defendant by the law enforcement officers. While the search by the officers of the police and sheriff departments was in progress, the defendant came to the sheriff's office and surrendered. Before officers would talk to defendant, they fully advised him of his rights under *Miranda* and defendant stated that he understood his rights. Had the defendant then voluntarily proceeded to give a *narrative statement*, under *Lynch* such a statement could have been properly admitted into evidence. Instead the record discloses that the only information given was during an interrogation by

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State v. Cannady

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one of the officers. Defendant was asked if he shot Joe Nathan Moore. His response was "yes." Defendant was asked what weapon he used. His response was "a sawed-off shotgun." At that point defendant refused to answer additional questions and the interrogation was terminated. Although the court's conclusions as to the voluntariness of defendant's statement was fully supported by the record, there must be a new trial by reason of admission of defendant's statement as evidence. Upon voir dire no inquiry was made as to whether defendant was indigent on 5 December 1970, the date he made the statement, and there are no findings in this regard. If, on that date, he was indigent within the meaning of the statute, he was entitled to the services of counsel at the interrogation. G.S. 7A-457.

We cannot say that the admission of the statement was harmless error beyond a reasonable doubt as was the case in *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671. The thrust of defendant's defense at trial was that he did *not* shoot the deceased but that he struck at deceased with the gun and it "just went off." Evidence that the defendant was guilty of the crime of which he was convicted was plenary. For the reasons stated, however, there must be a new trial. If, at the new trial, defendant's statement to the officers is offered, the trial court must follow the procedure set out in *State v. Lynch*, *supra*.

New trial.

Judges BROCK and BRITT concur.

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**Lewter v. Herndon**

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GRETHA P. LEWTER, ADMINISTRATRIX, AND JESSE HARVEY LEWTER, ADMINISTRATOR OF THE ESTATE OF JESSE RAY LEWTER, DECEASED v. ETHEL WIMBERLY HERNDON, EXECUTRIX OF THE ESTATE OF STACY W. HERNDON, DECEASED; HERNDON LUMBER COMPANY, INC., AND J. LEON ROGERS

No. 716SC583

(Filed 15 December 1971)

**Appeal and Error §§ 37, 44—case on appeal not agreed to—failure to file brief**

Appeal is dismissed where counsel for appellees had not agreed to the statement of the case on appeal filed by appellant but had filed exceptions thereto, and no settlement of the case on appeal had been made by the trial court, and appellants failed to file a brief within the time allowed by the rules. Court of Appeals Rules 5, 17 and 28.

APPEAL from *Cowper, Judge*, 10 May 1971 Session of Superior Court of BERTIE County.

This action was brought by the administrators of the estate of Jesse Ray Lewter to recover damages for the alleged wrongful death of their intestate. The case was tried before a jury. The jury answered in defendant's favor the issue as to whether Stacy W. Herndon was operating the motor vehicle at the time of the accident as alleged in the complaint. From entry of judgment on the verdict, plaintiffs gave notice of appeal.

*Malcolm B. Grandy for plaintiff appellants.*

*Pritchett, Cooke and Burch, by W. L. Cooke, and Banks and Weaver, by Thomas A. Banks, for defendant appellees.*

MORRIS, Judge.

Prior to the date set for oral arguments, defendants filed a motion to dismiss the appeal under Rule 5 and Rule 17, Rules of Practice in the Court of Appeals of North Carolina. As grounds for the motion, defendants say that plaintiffs served on defendants' counsel a proffered statement of case on appeal, and service was accepted on 16 July 1971. On the same day the case on appeal as served was docketed in this Court without knowledge of defendants' counsel and without any agreement that the transcript which was docketed did in fact constitute the case on appeal. In apt time defendants filed exceptions to the statement of case on appeal, and service thereof was accepted by counsel

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State v. Harrell

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for plaintiffs. No settlement of the case on appeal has been made by the trial tribunal as provided by G.S. 1-283. No answer has been filed to this motion.

Under the Rules of this Court, plaintiffs' brief should have been filed on 2 November 1971. No brief has been filed, and on 8 November 1971, defendants moved that the appeal be dismissed under Rule 28, Rules of Practice of the Court of Appeals of North Carolina, for plaintiffs' failure to file brief.

It appears that both motions are well taken.

Appeal dismissed.

Judges CAMPBELL and PARKER concur.

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STATE OF NORTH CAROLINA v. KENNIE HARRELL

No. 713SC688

(Filed 15 December 1971)

Constitutional Law § 30—right to speedy trial—delay between trials in recorder's court and superior court

A delay of almost three years between defendant's trial in the recorder's court and his trial *de novo* in the superior court did not violate his right to a speedy trial, especially where defendant was a fugitive from justice for much of the intervening time.

APPEAL by defendant from *Bowman*, *Special Judge*, 21 June 1971 Criminal Session of Superior Court held in CRAVEN County.

On 24 September 1968 in the Recorder's Court of Craven County defendant was convicted of three counts of assault with a deadly weapon. He received three six (6) month sentences which were to have been served concurrently. He gave notice of appeal to the superior court. After trial by jury in the superior court on 21 June 1971, he received three consecutive 18-24 month sentences. Defendant appealed.

*Attorney General Robert Morgan by Associate Attorneys Christine A. Witcover and William Lewis Sauls for the State.*

*John H. Harmon for defendant appellant.*

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Amodeo v. Beverly

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VAUGHN, Judge.

Defendant, through his court-appointed counsel, brings forward two assignments of error. He first contends that the court erred in not dismissing the action for lack of a speedy trial. "The burden is on the accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or wilfulness of the State's prosecution. The right to a speedy trial is not violated by unavoidable delays nor by delays caused or requested by defendants." *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309. The record discloses that for at least a substantial part of the time between his trial in recorder's court and the trial in superior court, defendant was a fugitive from justice. In fact defendant makes no contention that the State was responsible for any delay in trial from 25 May 1970 to the date of his trial on 21 June 1971. Defendant offered no evidence that he had requested an earlier trial or that he was prejudiced by the delay and, indeed, offers no argument as to how he contends he might have been prejudiced. This assignment of error is overruled.

Defendant also assigns as error the fact that he received greater punishment in the superior court than in the recorder's court. For the reasons stated in *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897, this assignment of error is overruled.

No error.

Judges BROCK and BRITT concur.

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RAFFAELE AMODEO v. F. G. BEVERLY AND ANNE L. EPLER

No. 713SC631

(Filed 15 December 1971)

**Appeal and Error § 6—orders appealable—pre-trial order amounting to a summary judgment**

An appeal from a purported pre-trial order is treated as a petition for certiorari by the Court of Appeals and is allowed, and the Court of Appeals vacates the pre-trial order, where the order amounted to summary judgment against appellant on at least one of the issues.

**APPEAL** by plaintiff from *Parker, Judge*, 14 June 1971 Session of Superior Court held in CRAVEN County.

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Amodeo v. Beverly

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This case presents the following procedural quagmire. Plaintiff instituted the action on 5 August 1969. Defendant filed answer and counterclaim on 15 August 1969. On 6 May 1970 the cause came on for trial. On motion of the defendant the case was continued and counsel for the parties then went into a pre-trial conference with the judge. On 25 May 1970 the judge filed a "pre-trial opinion." On 3 June 1970 plaintiff moved to "amend the pre-trial opinion" and further moved to join an additional party. On 15 September 1970 the judge granted the motion to join an additional party and continued plaintiff's motion to amend the pre-trial opinion. On 16 June 1971 the judge denied plaintiff's motion to amend. Plaintiff appealed.

*Nelson W. Taylor for plaintiff appellant.*

*Robert G. Bowers for defendant appellee Beverly.*

VAUGHN, Judge.

Ordinarily an appeal does not lie from an interlocutory order and particularly from a pre-trial order. *Green v. Insurance Co.*, 250 N.C. 730, 110 S.E. 2d 321. However, because the purported pre-trial order in the present case amounts to summary judgment against plaintiff on at least one of the issues, we treat plaintiff's appeal as a petition for certiorari which is hereby allowed. Defendants had not moved for summary judgment and plaintiff had no notice that such was being considered. The "pre-trial opinion" filed 25 May 1970 is hereby vacated and the cause is remanded to the Superior Court of Craven County.

Vacated and remanded.

Judges BROCK and BRITT concur.

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State v. Outen

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STATE OF NORTH CAROLINA v. JOHN "BUD" OUTEN

No. 7120SC636

(Filed 15 December 1971)

**Criminal Law § 75—in-custody statements—written waiver of counsel—findings on indigency**

The trial court erred in admitting defendant's in-custody confession made on 23 October 1970 in the absence of counsel without making findings as to whether defendant was an indigent at the time of his interrogation, and if indigent, whether defendant signed a written waiver of counsel.

APPEAL by defendant from *Thornburg, Judge*, 10 May 1971 Session of Superior Court held in UNION County.

Defendant was charged in a bill of indictment with the murder of Chester Strawn. The jury returned a verdict of guilty of voluntary manslaughter and judgment of confinement for a period of not less than six nor more than eight years was entered. Defendant appealed.

*Attorney General Morgan, by Assistant Attorney General Eatman, for the State.*

*James E. Griffin for the defendant.*

BROCK, Judge.

Defendant was arrested by the Sheriff of Union County on 23 October 1970. He was given the full Miranda warnings and he stated that he understood his rights. He confessed fully and this confession was admitted in evidence at his trial.

Before admitting defendant's confession in evidence, the trial judge properly conducted a *voir dire*, and, based upon competent evidence, made findings of fact and appropriately concluded that the confession was freely, understandingly, and voluntarily given. However, there was no evidence and no finding of facts with respect to defendant's indigency at the time of the interrogation, and there was no evidence or finding relative to whether, if indigent, defendant signed a written waiver of counsel.

This case was tried before the opinion in *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (filed 10 June 1971); even so, the rule enunciated therein is applicable. On the authority of *State*

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State v. Rhodes

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*v. Lynch, supra*, and *State v. Jackson*, 12 N.C. App. 566, 183 S.E. 2d 812, defendant is entitled to a new trial.

New trial.

Judges BRITT and VAUGHN concur.

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STATE OF NORTH CAROLINA v. STACEY MURRAY RHODES

No. 714SC534

(Filed 15 December 1971)

**Criminal Law § 138—appeal from district to superior court—increased sentence**

Defendant's constitutional rights were not violated when, upon his appeal to the superior court from a conviction in the district court, the superior court imposed a greater sentence than that imposed in the district court.

APPEAL by defendant from *Fountain, Judge*, 5 April 1971 Session of Superior Court held in ONSLOW County.

The defendant was charged in a valid warrant with speeding 90 miles per hour in a 55 mile per hour zone, and with operating a motor vehicle on the public highway while his driver's license was in a state of revocation. The defendant was first tried and convicted of these offenses in the District Court of Onslow County. From a judgment imposing a prison sentence of six months, the defendant appealed to the Superior Court of Onslow County. In the superior court the defendant pleaded not guilty to the charges and was found guilty by the jury. From a judgment in the superior court imposing a prison sentence of eighteen months, the defendant appealed to the North Carolina Court of Appeals.

*Attorney General Robert Morgan and Assistant Attorney General Thomas B. Wood for the State.*

*Warlick & Milsted by Alex Warlick, Jr., for defendant appellant.*

HEDRICK, Judge.

The one question presented on this appeal is stated by the defendant in his brief as follows: "DID THE SUPERIOR COURT ERR

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State v. Vanderburg

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WHEN IT IMPOSED A SENTENCE WHICH EXCEEDED THE PUNISHMENT OF THE DISTRICT COURT, IN VIOLATION OF THE CONSTITUTION OF NORTH CAROLINA, AND THE CONSTITUTION OF THE UNITED STATES?"

This question was answered in the negative by the North Carolina Supreme Court in the cases of *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970), and *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970).

We have reviewed the entire record and find that the defendant had a fair trial in the superior court free from prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

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STATE OF NORTH CAROLINA v. IVERY ALFONZO VANDERBURG

No. 7122SC666

(Filed 15 December 1971)

**Criminal Law § 23—guilty pleas—voluntariness—affirmative showing in record**

Defendant is entitled to have his pleas of guilty vacated and to replead to the charges against him where the record fails to show affirmatively that defendant was aware of the consequences of his pleas and that his pleas were voluntarily and understandingly entered.

APPEAL by defendant from *Crissman, Judge*, 21 May 1971 Criminal Session of IREDELL Superior Court.

The defendant, Ivery Alfonzo Vanderburg, was charged with resisting arrest, assault upon an officer and disorderly conduct and entered a plea of guilty at his trial in district court on 4 March 1971. Defendant was not represented by counsel either at the trial in district court or on appeal to Iredell Superior Court. In superior court defendant again entered a plea of guilty to the charges and was sentenced to six months in jail for resisting arrest and six months for assault on an officer and disorderly conduct under a consolidated judgment. From the judgment entered by the superior court, defendant appealed.

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State v. Woody

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*Attorney General Morgan by Assistant Attorney General Banks for the State.*

*Chambers, Stein, Ferguson & Lanning, by Charles L. Becton, for the defendant appellant.*

MORRIS, Judge.

The failure of the record to show affirmatively that defendant was aware of the consequences of his pleas of guilty and to show affirmatively that his pleas were voluntarily and understandingly entered entitles the defendant to have his pleas of guilty vacated and entitles him to replead to the charges. *State v. Harris*, 10 N.C. App. 553, 180 S.E. 2d 29 (1971). We find in the record no transcript of plea signed by the defendant nor any adjudication entered by the trial judge indicating that defendant freely, understandingly and voluntarily made the pleas. We must, therefore, order that defendant's pleas of guilty be stricken and the matter remanded so that defendant may replead.

Discussion of defendant's other assignments of error is not necessary.

New trial.

Judges CAMPBELL and PARKER concur.

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STATE OF NORTH CAROLINA v. FRANKLIN DEE WOODY AND  
CLIFFORD LEON KELLY

No. 7129SC717

(Filed 15 December 1971)

**Burglary and Unlawful Breakings § 5—identification of defendants—  
sufficiency of evidence**

The State offered sufficient evidence of the identification of defendants, including testimony by two eyewitnesses, to sustain their conviction of felonious breaking and entering.

ON *certiorari* to review trial before *Beal, Special Judge*, 17 April 1970 Session of Superior Court held in McDOWELL County.

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State v. Woody

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Defendants were convicted of felonious breaking and entering. From judgments imposing active prison sentences they gave notice of appeal. Because of the delay of the court reporter in furnishing counsel a transcript of the trial proceedings and counsel's consequent difficulty in docketing the record in this Court, we allowed certiorari to perfect a late appeal.

*Attorney General Robert Morgan by Assistant Attorney General Myron C. Banks and Associate Attorney George W. Boylan for the State.*

*I. C. Crawford for defendant appellants.*

VAUGHN, Judge.

As defendants correctly assert in their brief, the real issue at trial was that of identification of the defendants. On this question the State offered the testimony of two eyewitnesses whose testimony was unequivocal. James and Janice Burleson lived in an apartment over the premises which were broken into and from which the safe was stolen. They were awakened about 2 a.m. and went to their window. They saw three men walking away from the building, two of whom were carrying the safe. The area was lighted by a street light and a light near the door of the building. Janice Burleson could see the faces of, and positively identified, Kelly and Woody. James Burleson could only identify Kelly (The identity of the third man has apparently not been discovered). Defendants were represented by able counsel at trial and in this Court. We have carefully considered each of the 18 assignments of error brought forward by defendants and find no prejudicial error.

No error.

Judges BROCK and GRAHAM concur.

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State v. Bennett

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STATE OF NORTH CAROLINA v. LEROY (BILL) BENNETT

No. 7120SC618

(Filed 15 December 1971)

**Criminal Law § 155.5— failure to docket record in apt time**

Appeal is dismissed for failure to docket the record on appeal within 90 days from the date of the judgment appealed from, no order having been entered by the trial court extending the time for docketing the record on appeal. Court of Appeals Rule 5.

APPEAL by defendant from *Long, Judge*, at the Regular 12 April 1971 Criminal Session of ANSON Superior Court.

By bill of indictment proper in form, defendant was charged with (1) felonious storebreaking, (2) felonious larceny, and (3) feloniously receiving stolen property. He pled not guilty, the jury found him guilty on counts (1) and (2) and from judgment imposing prison sentences, he appealed.

*Attorney General Robert Morgan by James L. Blackburn, Assistant Attorney General, for the State.*

*Jones & Drake by Henry T. Drake for defendant appellant.*

BRITT, Judge.

The record filed in this court discloses that the judgment appealed from was entered on 15 April 1971 and the record on appeal was docketed on 4 August 1971. The record discloses no order extending the time for docketing the appeal beyond the 90 days provided by Rule 5 of the Rules of Practice in the Court of Appeals. For failure to comply with the rules, the appeal, *ex mero motu*, is dismissed. *State v. Isley*, 8 N.C. App. 599, 174 S.E. 2d 623 (1970); *State v. Stovall*, 7 N.C. App. 73, 171 S.E. 2d 84 (1970); *State v. Justice*, 3 N.C. App. 363, 165 S.E. 2d 47 (1968).

Nevertheless, we have carefully reviewed the record, with particular reference to the assignments of error brought forward and argued in defendant's brief, and find that defendant had a fair trial free from prejudicial error.

Appeal dismissed.

Judges BROCK and VAUGHN concur.

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**State v. Boyette**

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**STATE OF NORTH CAROLINA v. JOHN DAVID BOYETTE**

No. 713SC662

(Filed 15 December 1971)

**Criminal Law § 155.5—dismissal of appeal**

Appeal is dismissed for failure to docket the record on appeal within the time allowed by the Rules of the Court of Appeals.

APPEAL by defendant from *Exum*, Judge, 19 April 1971 Session, PITT Superior Court.

By warrant proper in form defendant was charged with operating a motor vehicle upon a public highway while under the influence of intoxicating liquor. He was tried and convicted in district court, and from judgment imposed in that court, he appealed to superior court where he was found guilty by a jury. From judgment imposing prison sentence of 30 days, defendant appealed to this court.

*Attorney General Robert Morgan by Burley B. Mitchell, Jr., for the State.*

*Sasser, Duke and Brown by John A. Duke and J. Thomas Brown, Jr., for defendant appellant.*

BRITT, Judge.

The record on appeal in this case was docketed in the Court of Appeals on 20 August 1971, some 120 days after the judgment appealed from was entered on 20 April 1971. The case was not docketed within the time allowed by our rules and no extension of time was granted. For failure to comply with the rules, the appeal is dismissed. *State v. Motley*, 11 N.C. App. 209, 180 S.E. 2d 458 (1971); *State v. McDaniel*, 10 N.C. App. 743, 179 S.E. 2d 833 (1971).

Nevertheless, we have carefully reviewed the record on appeal and find no prejudicial error.

Appeal dismissed.

Judges BROCK and VAUGHN concur.

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**State v. Rowland**

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**STATE OF NORTH CAROLINA v. JAMES OLIVER ROWLAND****No. 7114SC719****(Filed 15 December 1971)****Criminal Law § 18—jurisdiction of superior court on appeal from district court—sentence for misdemeanor**

An appeal to the superior court from a conviction in the district court gives the superior court the jurisdiction to sentence the defendant upon a plea of guilty to a misdemeanor. G.S. 7A-271(a)5; G.S. 7A-271(b).

APPEAL by defendant from *Martin, (Robert M.)*, *Special Judge*, 19 April 1971 Session of Superior Court held in Durham County.

In the district court defendant was convicted of driving a motor vehicle on the highway while his license was permanently revoked, in violation of G.S. 20-28(b). He appealed to the superior court where his plea of guilty to driving a motor vehicle on the highway while his license had been suspended or revoked, in violation of G.S. 20-28(a), was duly accepted. Defendant was represented by his privately retained attorney and appealed.

*Attorney General Robert Morgan by Assistant Attorney General Howard P. Satsky for the State.*

*Weatherspoon and Clayton by Jerry B. Clayton for defendant appellant.*

VAUGHN, Judge.

Defendant's only assignment of error is as follows:

"The trial court erred in sentencing the defendant after the State accepted the defendant's plea of guilty to driving while license revoked, a general misdemeanor, 20-28, Section A, since the District Court and not the Superior Court has original jurisdiction over misdemeanors and therefore the trial court did not have jurisdiction to sentence the defendant upon a plea of guilty to a misdemeanor."

This assignment of error is without merit. Defendant's appeal to the superior court gave that court the same jurisdiction as the district court had in the first instance. G.S. 7A-271(a)5

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State v. Jordan

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and G.S. 7A-271(b). The judgment of the superior court is affirmed.

Affirmed.

Judges BROCK and BRITT concur.

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STATE OF NORTH CAROLINA v. KENNETH JORDAN

No. 7110SC740

(Filed 15 December 1971)

**Forgery § 1—possession of forged instrument — presumptions**

A person who is found in the possession of a forged instrument and who is endeavoring to obtain money upon it is presumed to have forged the instrument or to have consented to its forgery.

APPEAL by defendant from *Hobgood, Judge*, 12 July 1971 Session of Superior Court held in WAKE County.

Defendant was convicted of forgery and of uttering a forged check. A discussion of the facts is not necessary to dispose of the appeal by the defendant.

*Attorney General Robert Morgan by Associate Attorney Henry E. Poole for the State.*

*Robert P. Gruber for defendant appellant.*

VAUGHN, Judge.

Defendant's court-appointed counsel brings forward only one assignment of error. Counsel tacitly concedes that to sustain his assignment of error this Court would have to overrule the long-standing doctrine set forth in *State v. Welch*, 266 N.C. 291, 145 S.E. 2d 902, as follows:

“ . . . ‘[W]hen one is found in the possession of a forged instrument and is endeavoring to obtain money or advances upon it, this raises a presumption that defendant either forged or consented to the forging such instrument, and nothing else appearing the person would be presumed to be guilty.’ ”

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State v. Moore

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For the reasons stated by Chief Justice Ruffin in *State v. Morgan*, 19 N.C. 348, the presumption is sound. The record in this case reveals no prejudicial error.

No error.

Judges BROCK and BRITT concur.

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STATE OF NORTH CAROLINA v. JERALD MOORE

No. 7119SC628

(Filed 15 December 1971)

**Forgery § 1—possession of forged instrument — presumptions**

A person who is found in the possession of a forged instrument and who is endeavoring to obtain money upon it is presumed to have forged the instrument or to have consented to its forgery.

APPEAL by defendant from *Collier, Judge*, 5 April 1971 Session of Superior Court held in MONTGOMERY County.

Defendant was convicted of forgery and of uttering a forged check. A discussion of the facts is not necessary to dispose of defendant's appeal.

*Attorney General Robert Morgan by Associate Attorney George W. Boylan for the State.*

*Charles H. Dorsett for defendant appellant.*

VAUGHN, Judge.

All of defendant's assignments of error are directed at the application of the doctrine that when one is found in the possession of a forged instrument and is endeavoring to obtain money or advances on it, this raises a presumption that the defendant either forged or consented to the forging of such instrument, and nothing else appearing, the person would be presumed to be guilty. For the reasons stated in *State v. Jordan*, No. 7110SC740, filed this date, all of the defendant's assign-

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State v. Lyndon

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ments of error are overruled. The record before this Court discloses no prejudicial error.

No error.

Judges BROCK and BRITT concur.

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STATE OF NORTH CAROLINA v. KENNETH MICHAEL LYNDON

No. 7119SC758

(Filed 15 December 1971)

APPEAL by defendant from *Johnston, Judge*, 19 July 1971 Session of RANDOLPH Superior Court.

The defendant was tried on a valid warrant charging him with operating a motor vehicle on one of the public highways of the State while under the influence of intoxicating liquor. The defendant entered a plea of not guilty to the charge and from a conviction in the district court appealed to the superior court where he was tried before a jury on his plea of not guilty. Upon a verdict of guilty and the imposition of judgment thereon, the defendant appealed.

*Attorney General Robert Morgan by Associate Attorney Louis W. Payne, Jr., for the State.*

*Ottway Burton for defendant appellant.*

CAMPBELL, Judge.

The evidence on behalf of the State tended to show that on Sunday morning, 22 November 1970 at approximately 2:00 o'clock, the defendant was driving a motor vehicle on U. S. Highway No. 220 By-pass in the vicinity of Asheboro. The manner and method of his operation of the vehicle attracted the attention of police officers of the Asheboro Police Department who stopped the defendant and subsequently placed him under arrest for operating a motor vehicle on a public highway while under the influence of an intoxicating beverage. At that time and again in court at the time of the trial, the defendant freely admitted that he had consumed five beers during the course of the evening while visiting a friend in Greensboro. Empty beer

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State v. Baldwin

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cans and a one-fifth bottle of whiskey half full were found in the automobile of the defendant. The officers testified to the defendant's reaction to various tests which were administered to him, including a breathalyzer test which registered .17.

The defendant recounted his actions on the evening in question and denied the charges made against him. The defendant also introduced evidence as to his general good character.

The defendant has assigned eleven assignments of error based on twenty-four exceptions.

We have carefully reviewed each of the exceptions discussed in the exhaustive and elaborate brief filed on behalf of the defendant, and we do not find any prejudicial error in the trial. The evidence was ample and sufficient to be submitted to the jury. The instructions of the trial judge to the jury and the course and conduct of the trial as revealed by the record were free from prejudicial error. It was a decision for the twelve jurors, and they found the facts contrary to the defendant. No new principles of law are in any way involved and nothing of interest to the bench or bar would be served by a detailed discussion of the numerous exceptions brought forward. Suffice it to say that we find

No error.

Judges MORRIS and PARKER concur.

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STATE OF NORTH CAROLINA v. LARRY BALDWIN

No. 7122SC751

(Filed 15 December 1971)

APPEAL by defendant from *Crissman, Judge*, 24 May 1971 Session of Superior Court held in IREDELL County.

This case was consolidated for trial with the case of *State v. William Baldwin* which is the subject of a separate appeal. (See opinion in case No. 7122SC752 by Chief Judge Mallard, filed this date.)

Defendant was charged in a bill of indictment, proper in form, with the armed robbery of Larry Shives and Lola Shives.

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**State v. Baldwin**

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Evidence for the State tended to show that on 6 January 1971, at approximately 8:40 p.m., defendant and his brother, William Baldwin, entered a store being operated by Larry Shives. One of the men put a gun to Shives' throat and threatened to kill him if he moved. The other one struck Shives in the head and rendered him unconscious. Shives' wife, Lola Shives, who was also present, was beaten by defendants about her face, head and breast. Shives regained consciousness as he was being kicked in the ribs and at that time observed money being taken from his pocket. Approximately \$3900 was taken from his person and two pistols were removed from his place of business.

Defendant, through his testimony and that of other witnesses, offered evidence tending to establish an alibi.

The jury returned a verdict of guilty and from judgment entered on the verdict defendant appealed.

*Attorney General Morgan by Assistant Attorney General Cole for the State.*

*Pope, McMillan & Bender by William H. McMillan for defendant appellant.*

GRAHAM, Judge.

We have searched the entire record. No error appears therein and we conclude that defendant had a fair trial free from prejudicial error. We hold his appeal to be frivolous.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

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State v. Atwood

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STATE OF NORTH CAROLINA v. CHRISTOPHER LYLE ATWOOD

No. 7121SC693

(Filed 15 December 1971)

APPEAL by defendant from *Lupton, Judge*, 14 June 1971 Session of Superior Court held in FORSYTH County.

Defendant was charged in a bill of indictment with the felonies of (1) breaking or entering, (2) larceny, and (3) receiving stolen property knowing it to have been stolen. Defendant tendered a plea to the misdemeanor of receiving stolen goods knowing them to have been stolen of the value of not more than two hundred dollars.

Upon his plea of guilty, defendant was sentenced to a term of two years imprisonment and he has appealed.

*Attorney General Morgan, by Associate Attorney Poole, for the State.*

*William Z. Wood for defendant.*

BROCK, Judge.

The bill of indictment under which defendant was charged is proper in form and adequately alleges the commission of three felonies. The charge to which defendant tendered a plea of guilty is a lesser included offense of the third count in the bill of indictment; therefore, the trial court had jurisdiction to accept the plea and enter judgment thereon. Defendant was supplied with counsel at the expense of the State and appointed counsel was able to secure a disposition of the case which is very favorable to defendant. Even so, the trial judge would not record defendant's plea of guilty to the misdemeanor until he meticulously examined defendant to determine that the plea of guilty was freely and understandingly tendered.

The bill of indictment lists the stolen property as seventy-eight rifles and shotguns valued at \$6,640.46. The State's evidence tended to show that defendant received sixteen of these stolen guns knowing them to have been stolen.

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State v. Wilson

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At the request of counsel, who candidly states that he is unable to find error, we have examined the entire record and in it we find

No error.

Judges BRITT and VAUGHN concur.

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STATE OF NORTH CAROLINA v. WILLIAM H. WILSON

No. 713SC684

(Filed 15 December 1971)

APPEAL by defendant from *Bowman*, *Special Judge*, 21 June 1971 Session of CRAVEN Superior Court.

On appeal to superior court defendant was tried on a warrant, proper in form, charging him with shoplifting in violation of G.S. 14-72.1. The jury returned a verdict of guilty and from judgment imposing prison sentence of six months, defendant appealed to this court.

*Attorney General Robert Morgan by Donald A. Davis, Staff Attorney, for the State.*

*Reginald L. Frazier for defendant appellant.*

BRITT, Judge.

With commendable candor, counsel assigned to perfect defendant's appeal to this court states that he has read and examined the transcript and all other documents pertinent to this case but fails to find error. We too have carefully reviewed the record and perceive no error prejudicial to defendant.

No error.

Judges BROCK and VAUGHN concur.

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**State v. Brown and State v. Maddox and State v. Phillips**

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**STATE OF NORTH CAROLINA v. ALBERT GERALD BROWN****STATE OF NORTH CAROLINA v. JIMMY MADDOX, ALIAS  
BILLY CAMPBELL****STATE OF NORTH CAROLINA v. WILLIAM RILEY PHILLIPS****No. 7122SC728****(Filed 29 December 1971)****1. Robbery § 2—attempted armed robbery—sufficiency of indictments**

Bills of indictment charging attempted armed robbery of "good and lawful U. S. Currency of the value of ....." from a named grocery store *held* sufficient to show that the U. S. currency had value, that the currency was under the care of two employees of the store, and that the defendants were not attempting to take their own property.

**2. Criminal Law § 15—motion for removal to adjacent county—unfavorable pretrial publicity**

A motion for removal to an adjacent county or for the selection of a jury from an adjacent county on the grounds of unfavorable pretrial publicity is addressed to the sound discretion of the court; the burden of proof on this motion is on the defendant.

**3. Criminal Law § 15—motion for removal to adjacent county—unfavorable pretrial publicity—sufficiency of affidavits**

Defendants' motion that unfavorable publicity warranted the removal of attempted armed robbery cases to an adjacent county or the selection of a jury from an adjacent county *held* properly denied by the trial court in the exercise of its discretion, where defendants' evidence in support of the motion consisted of only five newspaper articles, which contained factual accounts of defendants' attempted robbery, of defendants' arrest for the crime, and of defendants' escape from the county jail.

**4. Criminal Law §§ 101, 130—motion for mistrial—juror's hearing of defendants' escape**

The fact that a prospective juror had heard of defendants' escape from jail did not warrant a mistrial in defendants' trial for attempted armed robbery.

**5. Jury § 7—peremptory challenges—noncapital case**

Defendant in a noncapital case was not entitled to peremptorily challenge more than six jurors. G.S. 9-21.

**6. Criminal Law § 102—argument of solicitor—reference to defendant as "young animal"**

Portion of the solicitor's argument which referred to the defendant as a "young animal," although disapproved, was not prejudicial.

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**State v. Brown and State v. Maddox and State v. Phillips**

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**7. Criminal Law § 102—solicitor's argument**

Portion of the solicitor's argument "If they [defendants] weren't guilty why were they up here anyway after the preliminary hearing where probable cause was found?" *held* not prejudicial within the context of this particular case so as to warrant a new trial.

**8. Robbery § 4—attempted armed robbery—sufficiency of the evidence**

Evidence of defendants' guilt of attempted armed robbery was sufficient to go to the jury.

**9. Criminal Law §§ 92, 102—consolidation of trial involving three defendants—right to closing argument to jury**

Where three defendants were charged with the identical felony of attempted armed robbery from the same persons and premises and at the same time, the trial judge did not abuse his discretion in allowing the State's motion to consolidate, even though the consolidation deprived the defendants from making the closing argument to the jury. G.S. 84-14.

**10. Jury § 3—qualification of jurors—summoning of jurors not on regular list**

Order of the trial judge requiring the sheriff to summon 25 additional jurors without resorting to the regular jury list was proper where the order required "that the jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected from the regular jury list." G.S. 9-11(a).

**11. Robbery § 4—attempted armed robbery—sufficiency of evidence—effect of defendant's self-serving declarations**

In a consolidated trial of three defendants for the attempted armed robbery of a grocery store, evidence that one defendant, with a gun in his hand, was in the store at the time of the attempted robbery and that the defendant ran from the store and got into the car with the two other defendants, *held* properly submitted to the jury on the issue of the defendant's guilt, notwithstanding defendant's self-serving declarations at the time of the attempt, "I'm not in on this," and "I'll try to stop them for you."

APPEAL by defendants from *Beal, Judge*, 26 April 1971 Mixed Session of Superior Court held in DAVIDSON County.

The cases against these three defendants arose out of the same occurrence, and were consolidated for preliminary hearing on a warrant, proper in form, charging each of them in identical language with the felony of attempted armed robbery, in violation of G.S. 14-87. Probable cause was found at the preliminary hearing, and the cases were transferred to superior court for trial. Identical bills of indictment were returned against the defendants charging each with:

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**State v. Brown and State v. Maddox and State v. Phillips**

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“ . . . (U)nlawfully, wilfully, and feloniously, having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a pistol whereby the life (sic) of Terry Lowery and Bradley Brogdon was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously attempt to take, steal, and carry away good and lawful U. S. Currency of the value of \_\_\_\_\_ from the presence, person, place of business, and of Abernathy's Grocery contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.”

At the trial, each defendant pleaded not guilty.

State's witness Terry Lowery testified, in substance, that at 9:15 p.m. on 11 February 1971, he and Bradley Brogdon were employees and were in charge of Abernathy's Grocery Store owned by Mr. and Mrs. Garland Abernathy in Lexington. At that time there was between three and four thousand dollars in cash in or near the cash register in the store. Defendant Jimmy Maddox, alias Billy Campbell (Maddox), entered the store and asked for a package of cigarettes, which were kept behind the cash register. Lowery gave the cigarettes to Maddox. Maddox had on a blue jacket. Defendant Albert Gerald Brown (Brown) had also entered the store and was at that time behind Lowery. Maddox told Lowery to empty the cash register, and Brown told Lowery that it was a holdup and to empty the cash register. Lowery turned toward Brown and Brown shot him in the hip with a .22 caliber weapon. Lowery went to the cash register and put his hands on it. Maddox said something and when Lowery looked toward him, Maddox shot him with a revolver, striking him in the face. Lowery then opened the cash register, got a pistol and started firing back at Maddox. Only the package of cigarettes was taken—no money was taken. Lowery was taken to the hospital where he remained for six days.

State's witness Bradley Brogdon testified, in substance, except where quoted, that he was “helping out” at Abernathy's Grocery on this occasion. He was at the counter where the drugs were and was waiting on a woman customer when someone came in the front door. While he was getting something the customer had requested, he heard the shooting on the other side of the store near the cash register. Brogdon testified he looked

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State v. Brown and State v. Maddox and State v. Phillips

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and saw a "fellow with a blue jacket on crouched down over behind a pair of scales and a rack with some candy on it, about fifteen feet from me. After I heard the shooting going on up where Mr. Lowery was, I backed back in behind the drug shelf, the rack for the drugs. I got my gun out, out of my pocket. I fired one time at the fellow what (sic) was hiding over there. Then, instead of coming back out the way I went in behind the drug rack, I went, I came out behind the rack, in behind it, and the fellow standing there, when I walked behind there he was crouched down at the end of the ice cream box. I walked up in behind him and he raised up.

"I see that man in the courtroom today—the second man over there with the yellow tee shirt on. That's the man I know as William Riley Phillips. That is the man I saw crouched down there. He went toward the door. When he started toward the door I seen (sic) him with a gun in his hand. I followed him all the way out on the porch, out to where he hit the road; when he got on the road he started running down there at the car. When he started running, he got on down there and caught up with the fellow that had the blue jacket on, he was down there at the car, and both of them got in the same car. I didn't see but two people get in the car."

On cross-examination, Brogdon stated that after he had come up behind Phillips, Phillips said, "I'm not in on this," and "I'll try to stop them for you"; and that Phillips had then run out of the building with a gun in his hand and "caught up with the guy right at the car with the blue jacket on and both got in the same car. The man in the blue jacket was already right at the car." There were three people in the car as it pulled away.

Defendants Maddox and Phillips offered no evidence.

Defendant Brown offered evidence in the form of testimony by Ray Rollins, a reporter for the Winston-Salem Journal, who stated that he had attended the preliminary hearing in these cases and could not recall specifically what the State's witness Lowery had testified to regarding his identification of the defendant Brown.

Defendant Brown also offered as a witness District Court Judge Hubert E. Olive, Jr., who testified that he presided at the preliminary hearing in the case against Mr. Brown and that Terry Lowery had testified on direct examination for the

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**State v. Brown and State v. Maddox and State v. Phillips**

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State that Brown was present in the store but on cross-examination, "he was somewhat less positive in his identification of Albert Gerald Brown."

The jury returned a verdict of guilty as to each defendant. From a judgment of imprisonment, each defendant appealed.

*Attorney General Morgan and Assistant Attorney General Rosser for the State.*

*Robert L. Grubb for defendant Albert Gerald Brown, appellant.*

*Barnes & Grimes by Jerry B. Grimes for defendant Jimmy Maddox, alias Billy Campbell, appellant.*

*Walser, Brinkley, Walser & McGirt by Walter F. Brinkley for defendant William Riley Phillips, appellant.*

MALLARD, Chief Judge.

The three indigent defendants each had different counsel assigned to represent them. As was proper under such circumstances, only one record was filed in this court. Each defendant made separate assignments of error. We therefore consider the appeal and assignments of each defendant separately.

[1] None of the defendants moved to quash the bills of indictment. Both Maddox and Brown moved that judgment be arrested (without citing any reasons), but Phillips did not make such a motion. However, the State, in its brief, calls attention to the bills of indictment and cites the case of *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971). If the bill of indictment fails to charge a crime, judgment must be arrested, and allegations in the warrant cannot be used to supply a deficiency in the bill of indictment. *State v. Benton*, 275 N.C. 378, 167 S.E. 2d 775 (1969).

The bill of indictment in *State v. Owens*, *supra*, was held to be sufficient to withstand a motion to quash and to charge the crime of attempted armed robbery. It contained the following language:

" . . . (C)arry away U. S. currency of the value of \_\_\_\_\_ from the presence, person, place of business, and residence of Harvey I. Stevens . . . . "

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State v. Brown and State v. Maddox and State v. Phillips

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The Supreme Court in *Owens* said:

“ \* \* \* The gist of the offense as described in this indictment is the attempt to commit robbery by the use or threatened use of firearms. The force or intimidation occasioned by the use or threatened use of firearms is the main element of the offense. In such a case, it is not necessary or material to describe accurately or prove the particular identity or value of the property, provided the indictment shows that the property was that of the person assaulted or under his care, and that such property is the *subject of robbery* and that it had *some* value. (Citations omitted.)

\* \* \* In the present case the property involved is described as ‘U. S. currency.’ This is the subject of robbery and some value can be inferred from the description of the property itself. ‘In an indictment or information for robbery by taking money, the term “money” itself imports some value, of which fact the court will take judicial notice.’ 77 C.J.S. Robbery § 37. Money is recognized by law as property which may be the subject of larceny, and hence of robbery. \* \* \* Here, we have an attempted robbery, and it is impossible to charge the exact value of the property involved, because no property was, in fact, taken.” (Emphasis original.)

The bills of indictment in the case before us were rather crudely drawn, and it appears that the draftsman made an effort to see how much of the language contained in the warrants could be left out of the bills; however, we think the property attempted to be taken was adequately described and the bills were sufficient, when considered as a whole, to show that the U. S. currency had value and was under the care of Terry Lowery and Bradley Brogdon. They were also sufficient to negative the idea that the defendants were attempting to take their own property, to inform the defendants of the charges against them, and to support a plea of former jeopardy. See *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971) and 77 C.J.S., Robbery, §§ 36, 37, 38 and 39.

BROWN APPEAL

[2, 3] Brown’s first contention is that the trial judge committed error in denying the motion for removal of the cases

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**State v. Brown and State v. Maddox and State v. Phillips**

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(due to unfavorable pretrial publicity) to an adjacent county for trial or to have the jury selected from an adjacent county as provided in G.S. 1-84.

The motion by the defendants for removal to an adjacent county or to cause a jury to be selected from an adjacent county on the grounds of unfavorable publicity was addressed to the sound discretion of the court. *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10 (1967); *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453 (1967); *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341 (1967); 2 Strong, N. C. Index 2d, Criminal Law, § 15; 21 Am. Jur. 2d, Criminal Law, § 236. The burden of proof on this motion was on the defendant. 21 Am. Jur. 2d, Criminal Law, § 422. "A motion for change of venue or for a special venire, may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable here unless gross abuse is shown." *State v. Allen*, 222 N.C. 145, 22 S.E. 2d 233 (1942).

In support of their motion for a change of venue, all defendants offered the affidavit of Willie F. Everhart, in which it is asserted that, due to news coverage on radio and newspapers, "any jury composed of Davidson County people would have a preconceived or biased opinion," and that in his opinion these defendants could not receive a fair trial from such a jury. Attached to the motion as exhibits are purported reproductions of only five news items appearing on the front page of *The Dispatch*, the only daily newspaper published in Lexington.

The first of these articles was published on Friday, 12 February 1971, with the following headline: "Bandits Flee Empty Handed—Local Man Shot Foiling Holdup." The names of the "bandits" referred to do not appear in this article.

On Saturday, 13 February 1971, an article appeared under the headline: "Four Charged in Theft Attempt." In this article the defendants are named, and it is stated therein that Brown and Maddox were escapees from a Florida prison unit.

The next exhibit purports to be from the 5 April 1971 edition of *The Dispatch* and has the headline: "Two Recaptured Later—Three Escape from County Jail." In this article it is reported, among other things, that Brown, Maddox and Phillips overpowered a deputy sheriff and a trustee and escaped, and

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that Phillips and Maddox were recaptured, but that Brown remained at large.

The fourth exhibit purports to be from the 6 April 1971 edition and has the headline: "Jail Escapee Still at Large." It is stated therein that the officers had used bloodhounds and an airplane in their efforts to apprehend Brown.

The last exhibit, purportedly from the Wednesday, 7 April 1971, edition of the paper, has the headline: "Third Escapee is Apprehended." In this article it is related that "Brown had been the object of a search since he and two other men escaped from jail here Monday morning."

No other newspaper articles are attached as exhibits, nor are the contents of any radio news broadcasts included. Nor did the defendants attach as exhibits any copies of articles, if any, appearing in the Thomasville Times or the Denton Record (two other newspapers published in Davidson County) or in the Winston-Salem Journal, a daily newspaper published in the adjoining county of Forsyth. The court found that, according to the last census, Davidson County had a population of 95,622 and that the Lexington Dispatch had a daily circulation of approximately 11,000.

The robbery was alleged to have occurred on 11 February 1971. After two days the newspaper in Lexington apparently did not consider it newsworthy because defendants offer as exhibits no articles after 13 February 1971 until after the alleged escape on 5 April 1971, and none dated after 7 April 1971. The trial was held at the 26 April 1971 Session of Superior Court held in Lexington, the county seat of Davidson County. Only three articles relating to the escape are made exhibits in support of the defendants' motion, and none appear after the date the defendant Brown was alleged to have been apprehended. These articles may be considered ordinary reporting of factual occurrences and do not appear to be inflammatory. While defendants, in their unverified motion, assert that the escape "caused widespread anxiety and animosity within the community," we find no evidence or implication in the record to support such an assertion. The daily newspaper published in Lexington apparently had no article about the trial on the date of the trial, because nothing appears in this record with respect thereto.

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On this record we hold that no prejudicial effect on the trial jury has been shown and that the trial judge did not abuse his discretion in denying the defendant's motion for removal or a jury from another county on the grounds of pretrial publicity. See Anno., 33 A.L.R. 3d 17.

[4] Brown further contends, however, that the trial judge committed error in denying his motion for a mistrial, a motion made because a prospective juror had heard that the defendants had escaped from jail. The prospective juror, Jerry Brinkley, when asked if he had heard the case discussed in the community, said, "Except when they escaped, I heard that." There was no attempt to challenge this prospective juror for cause before he was peremptorily excused by the defendant Maddox. No authority is cited by Brown or any of the other defendants for his position. In the factual setting of this case, it was not prejudicial error to deny defendant's motion for a mistrial because of what this prospective juror said. See *State v. Andrews*, 12 N.C. App. 421, 184 S.E. 2d 69 (1971), *cert. denied*, 279 N.C. 727 (1971).

[5] Defendant Brown contends also that the trial judge committed error in not permitting him to exercise more than six peremptory challenges, because Brown asserts that most of the prospective jurors were acquainted with the case. G.S. 9-21 permits a defendant in cases other than capital to peremptorily challenge six jurors and no more. In this case the defendant did not challenge the three jurors for cause but sought only to challenge them peremptorily after he had used six peremptory challenges. (Defendant Phillips in his brief admits that there was no cause to challenge the jurors that he attempted to peremptorily challenge.) The trial judge did not commit error in failing to permit the defendant to peremptorily challenge more than six jurors. See *Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951).

The defendant Brown assigns as error certain portions of the solicitor's argument to the jury. This was a hotly-contested case, and since the argument of defense counsel does not appear in the record, we are unable to determine if the solicitor was responding to provocation.

"Counsel must be allowed wide latitude in the argument of hotly contested cases. But what is an abuse of this privilege must ordinarily be left to the sound discretion

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of the trial judge, and we 'will not review his discretion, unless the impropriety of counsel was gross and well calculated to prejudice the jury,' *S. v. Baker*, 69 N.C. 147. (other citations omitted) Counsel should not go beyond the testimony in a case or characterize a defendant in a manner calculated to prejudice the jury against him. (citations omitted)" *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466 (1949). See also *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968), cert. denied, 393 U.S. 1042, 21 L.Ed. 2d 590, 89 S.Ct. 669 (1969); and *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955).

[6] One of the portions objected to was when the solicitor said, "He (Lowery) heard Maddox say something and turned around and lo and behold, that young animal shot him." It is conceded that a solicitor should not be permitted to heap verbal abuse, not warranted by the evidence, upon a defendant. While we do not approve of a defendant being referred to as an "animal," we cannot say that it was prejudicial error in this case to do so.

[7] Another portion of the solicitor's argument to which the defendant objected is: "If they weren't guilty why were they up here anyway after the preliminary hearing where probable cause was found?" This statement came immediately after the solicitor had argued that the State contended that the defendants were guilty beyond a reasonable doubt upon the testimony of Lowery and Brogdon. We do not approve of the argument objected to, but in view of the fact that one of the defendants had offered evidence of what the State's witnesses had testified to at the preliminary hearing in an effort to impeach them, we do not think that it was of such a prejudicial nature as to warrant a new trial.

(We have examined the other exceptions of all the defendants to the argument of the solicitor, and while his argument might have been made in a less objectionable manner, we do not think that it was so unfair as to prejudice the jury against the defendants.)

[8] Defendant Brown also contends that the trial judge committed error in overruling his motion to set aside the verdict as being contrary to the evidence in the case, and in failing to allow his motion in arrest of judgment. We hold that there

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was ample evidence of Brown's participation in this attempted robbery and that both of these contentions are without merit.

**MADDOX APPEAL**

[9] The assignments of error presented by the defendant Maddox relating to the motions for removal of his case to an adjacent county, selection of a jury from an adjacent county and for a mistrial because of statements made by a prospective juror on voir dire, and his objections to the argument of the solicitor are overruled for the reasons hereinabove set forth under the appeal of the defendant Brown.

Maddox further contends, however, that the trial judge committed error in consolidating these three indictments for trial, which resulted in depriving Maddox of the alleged right to make the closing argument to the jury. This contention is without merit. These three defendants were charged with the identical felony of attempted armed robbery from the same persons and premises and at the same time. The trial judge did not abuse his discretion in allowing the motion to consolidate. *State v. Blackburn*, 6 N.C. App. 510, 170 S.E. 2d 501 (1969) ; 2 Strong, N. C. Index 2d, Criminal Law, § 92. The time and sequence of the argument of counsel in a criminal case is controlled by G.S. 84-14 and the General Rules of Practice for the Superior and District Courts as set forth in volume 276 of the North Carolina Reports at page 735, *et seq.* Rule 10 thereof, in pertinent part, reads: "In a criminal case, where there are multiple defendants, if any defendant introduces evidence the closing argument shall belong to the solicitor."

[10] Defendant Maddox also assigns as error the two entries by the trial judge of an order requiring the sheriff to summon twenty-five additional jurors without resorting to the regular jury list. This contention is without merit. In each of the orders the trial judge required "that the jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected from the regular jury list." This was in compliance with the statute that provides that "jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected for the regular jury list." G.S. 9-11(a). There is no contention made that the jurors actually summoned lacked the proper qualifications or were not subject to the same challenges.

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Defendant Maddox also contends that the trial judge committed error in denying his motion for judgment as of nonsuit. This contention is without merit as there was ample evidence against the defendant Maddox to require submission of his case to the jury.

We have carefully considered all of the other assignments of error presented by the defendant Maddox and find no prejudicial error in his trial.

### PHILLIPS APPEAL

The assignments of error presented by Phillips relating to consolidating the three cases for trial, the motions for removal of his case to an adjacent county or for a special venire from an adjacent county, the motion for a mistrial because of statements made by a prospective juror on voir dire and the failure of the trial judge to grant a new trial due to the impropriety of the solicitor's argument are all overruled for the reasons hereinabove set forth under the considerations of the appeals of the defendants Brown and Maddox.

[11] In addition, however, the defendant Phillips argues and contends that the trial judge should have allowed his motion for judgment as of nonsuit. We disagree. The evidence tended to show that Brown, Maddox and Phillips were all in the store at the time of the attempted robbery. Each had a gun at the time of the shooting. Brown shot Lowery in the hip. Maddox shot Lowery in the face. Lowery was shot after Brown and Maddox had informed him "it was a holdup" and had demanded that he empty the cash register. Phillips, at the time Lowery was shot, was crouched down behind a pair of scales, and Phillips had a gun in his hand when he fled the store. Although he made two self-serving declarations, "I'm not in on this," and "I'll try to stop them for you," he ran and got into the car with the others and left. That Phillips was in the store at the time of the attempted robbery, with a gun in his hand, and that he ran and got in the car and left with the other two defendants, were circumstances sufficient to require submission of his case to the jury. See *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

Lastly, the defendant Phillips assigns as error certain portions of the instructions given by the trial judge in his charge

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to the jury. When the charge is construed as a whole, as we are required to do, we hold that no prejudicial error appears.

The result is:

Albert Gerald Brown — No Error.

Jimmy Maddox, alias Billy Campbell — No Error.

William Riley Phillips — No Error.

Judges HEDRICK and GRAHAM concur.

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SANFORD L. KORSCHUN, EXECUTOR OF THE ESTATE OF  
CHARLES S. KORSCHUN v. I. L. CLAYTON, NORTH CAROLINA  
COMMISSIONER OF REVENUE

No. 718SC634

(Filed 29 December 1971)

**Taxation § 27—inheritance tax — gift to minor — donor as custodian**

The value of property which is the subject of a gift to the donor's unemancipated minor child under the North Carolina Uniform Gifts to Minors Act is includable in the gross estate of the donor for State inheritance tax purposes where the donor appoints himself as custodian of the property and dies while serving in that capacity before the minor donee attains his majority. G.S. 105-2(3).

APPEAL by defendant from *Cohoon, Judge*, 31 May 1971 Civil Session, Superior Court of WAYNE County.

Charles S. Korschun died a resident of Wayne County, North Carolina, on 6 July 1967. Plaintiff is the duly appointed, qualified, and acting executor of his estate. After the death of Charles S. Korschun, an "Inheritance and Estate Tax Return" was duly filed, and the tax paid upon the assets shown therein to be taxable. Thereafter, defendant assessed an additional tax in the amount of \$3,249.76 which plaintiff paid under protest. Defendant refused plaintiff's demand for refund, and this action was brought to recover the additional tax which plaintiff contends was wrongfully assessed. The additional assessment resulted from the inclusion by defendant in the tax-

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able estate of 103 shares of Pepsi-Cola Bottling Company of Goldsboro, Inc., which had a fair market value of \$55,978.44 on the valuation date. Decedent, during his lifetime, had made a gift of this stock to himself as custodian for his son, Howard M. Korschun, under the provisions of the Uniform Gift to Minors Act (G.S. 33-68 through G.S. 33-77). The gift was made more than three years prior to the death of decedent. The matter was heard by the court without a jury and upon an agreed statement of facts, the court entered judgment in favor of plaintiff, and defendant appealed.

*Attorney General Morgan, by Assistant Attorney General Banks, for defendant appellant.*

*Smith and Everett, by W. Harrell Everett, Jr., for plaintiff appellee.*

MORRIS, Judge.

The sole question presented by this appeal is this: Is property which is the subject of a gift to a donor's unemancipated minor child under the North Carolina Uniform Gifts to Minors Act includable in the gross estate of the donor, for inheritance tax purposes pursuant to Schedule A, Article 1, Subchapter I, Chapter 105 of the General Statutes of North Carolina, where the donor appoints himself as custodian of the property and dies while serving in that capacity before the minor donee attains his majority? This precise question has not before been presented for appellate review in this State. The trial tribunal answered it in the negative. We disagree.

The North Carolina Act entitled "North Carolina Uniform Gifts to Minors Act" was enacted in 1955 and is essentially, indeed almost verbatim, the Uniform Act. North Carolina was one of the first 14 states to enact a counterpart of a model "Act Concerning Gifts of Securities to Minors." The movement to permit gifts of securities and money to minors without the legal complexities of a trust instrument was begun in 1954 at a meeting of the National Association of Securities Administrators. The President of the New York Stock Exchange, in a speech to that group, suggested that a survey disclosed that almost one-half of parents with incomes above \$7500 who owned shares of stock would like to buy stock for their children but did not want

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to enter into a complicated legal procedure. A direct gift of securities to minors involved serious practical difficulties. For example, should there be a sale of the securities during the minority of the registered owner, the minor could disaffirm the sale. Banks, brokers, transfer agents and issuers dealt with the minor at their peril. At the meeting, the New York Stock Exchange submitted a draft of a proposed custodian statute which it had prepared. The Association of Stock Exchange Firms agreed to assist in securing the enactment of a uniform statute in all states. The basic custodian statute providing for gifts to minors is now in effect in substantially all the States. See Uniform Gifts to Minors Act, § 1, 9B U.L.A. (Supp. 1967) ; Newman, "The Uniform Gifts to Minors Act in New York and Other Jurisdictions—Tax Consequences, Possible Abuses, and Recommendations," 49 Cornell Law Quarterly 12 (1963).

The pertinent sections of the North Carolina Act provide:

G.S. 33-70(a). A gift made in the manner prescribed by the Act is irrevocable and conveys to the minor indefeasibly vested legal title to the security, money, or life insurance given. No guardian of the minor has any rights or duties with respect thereto except as provided in the article.

G.S. 33-71(c). If the minor has attained age 14, the court, on petition of the minor's parent or guardian, may order the custodian to pay to the minor for expenditure by him or to expend so much or all of the "custodial property" as is necessary for the minor's support, maintenance, or education.

G.S. 33-71(d). So much of the custodial property not so expended shall be delivered to the minor upon his attaining age 21. Should he die before reaching age 21, the custodial property shall be delivered to his personal representative.

G.S. 33-71(e). The custodian, without regard to statutes restricting investments by fiduciaries, is to invest and reinvest the custodial property as would a prudent man of discretion and intelligence seeking a reasonable income and preservation of capital. He may retain any security given. He may use the funds to purchase life insurance and pay premiums thereon and to pay premiums on life insurance given under the Act.

G.S. 33-71(f). The custodian may sell, exchange, convert or otherwise dispose of custodial property at any time deemed

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advisable by him and for the price or upon terms he deems advisable. He may vote the securities in person or by proxy. He may consent to any action taken by an issuer, including the sale, lease, pledge or mortgage of any property by or to an issuer.

G.S. 33-71(h). The custodian shall keep records and make them available to the minor (if he has attained age 14), a parent or legal representative of the minor at regular intervals.

G.S. 33-71(i). "A custodian has and holds as powers in trust with respect to the custodial property, in addition to the rights and powers provided in this article, all the rights and powers which a guardian has with respect to property not held as custodial property."

G.S. 33-75. If the minor has attained age 14, he may petition the court for an accounting. This may also be done by the donor, an adult member of the minor's family, or the legal representative of the minor or the donor.

The Act further provides for the resignation, death or removal of the custodian and appointment of a successor and the custodian's compensation. It specifically provides that the donor may name himself as custodian in every type of gift allowed by the Act with the exception of a security not in registered form.

If the Pepsi-Cola stock which is the subject of controversy is includable in decedent-donor's estate for inheritance tax purposes, it must be under the provisions of G.S. 105-2 which imposes an inheritance tax on "the *transfer* of any property, real or personal, or of any interest therein or income therefrom, *in trust or otherwise*, to persons or corporations, in the following cases:

. . .

(3) When the transfer of property made by a resident, or nonresident, is of real property within this State, or of goods, wares and merchandise within this State, or of any other property, real, personal, or mixed, tangible or intangible, over which the State of North Carolina has taxing jurisdiction, including State and municipal bonds, by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor, *or intended to take effect in possession or enjoyment at or after such death, including a transfer under which the transferor has re-*

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*tained for his life or any period not ending before his death (i) the possession or enjoyment of, or the income from, the property or (ii) the right to designate the persons who shall possess or enjoy the property or the income therefrom. Every transfer by deed, grant, bargain, sale, or gift, made within three years prior to the death of the grantor, vendor, or donor, exceeding three per cent (3%) of his or her estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death within the meaning of this section."* (Emphasis supplied.)

Unquestionably a gift made under the provisions of the Uniform Act is a "transfer." The inheritance tax is imposed by statute on a transfer *in trust or otherwise* where the transfer was intended to take effect in possession or enjoyment at or after donor's death. This type of transfer includes, by the clear language of the statute, "a transfer under which the transferor has retained for his life or any period not ending before his death (i) the possession or enjoyment of, or the income from, the property or (ii) the right to designate the persons who shall possess or enjoy the property or the income therefrom."

Here donor was the father of the donee, an unemancipated minor. Obviously the father owed the child a duty of support. The Uniform Act permits him in his discretion to use the principal and income of the custodial gift for that purpose and thereby retain the full possession and enjoyment of his own estate without diminution by expenditures of funds for the support of his child, the donee. Additionally, the Uniform Act gives the custodian full powers to vote and deal with the securities which might be the subject of the gift. Here the donor was the majority stockholder of the issuer and had the right to use his control over the securities which were the subject of the gift to effectuate, if necessary, his continuing control over the issuer.

Our Supreme Court has said: "A law imposing an inheritance tax is to be liberally construed to effectuate the intention of the Legislature, and all property fairly and reasonably coming within the provision of such law may be taxed." *Watkins v. Shaw, Comr. of Revenue*, 234 N.C. 96, 98, 65 S.E. 2d 881 (1951), and cases there cited. We think the language of the statute, G.S. 105-2(3), is clear and unambiguous and requires the inclusion

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of value of the stock in controversy in decedent donor's taxable estate.

Appellee argues that no pledge was made of the stock, no income therefrom was received by donor and no part of the gift was ever used for the support of the minor donee. He further argues that since donee was vested with legal title, donor had divested himself thereof. Conceding all this to be true, we think it of no import. The important determinative factors are the rights reserved to the donor in instances where, as here, the donor makes the gift to himself as custodian and dies prior to the donee's reaching age 21. These rights are there, existed at the time of the transfer, and continued to be possessed by donor until the time of his death. Whether the rights are ever exercised is of no consequence.

The Internal Revenue Service early ruled that "the value of property transferred by a donor to himself as custodian for a minor donee, pursuant to the provisions of the model custodian act adopted by a number of the states, is includible in the donor's gross estate for Federal estate tax purposes in the event of his death while acting as custodian and before the donee attains the age of 21 years." Rev. Rul. 57-366. The ruling was based upon § 2038 I.R.C. 1954 (transfers in respect of which decedent retained a power to alter, amend, revoke, or terminate). In *Estate of Jack F. Chrysler*, 44 T.C. 55 (1965), decedent had made gifts of securities to himself as custodian under the provisions of New York custodial gift statute and died before donee attained age 21. The Tax Court held the value of the securities includable in his taxable estate under both sections 2038(a) (1) and 2036(a), I.R.C. 1954. Section 2036(a) taxes transfers, by trust or otherwise, under which donor has "retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—(1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

The U. S. Supreme Court has held that where a settlor named himself as trustee of stocks and money for his minor children in an irrevocable trust in which the rights of the children had vested, but settlor reserved the right to terminate it and deliver the assets of the trust to the children, the power

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was equivalent to a power to alter, amend, or revoke and the assets were includable in his estate. *Lober v. United States*, 346 U.S. 335, 98 L.Ed. 15, 74 S.Ct. 98 (1953). There the Court, quoting from *Comm'r. v. Holmes*, 326 U.S. 480, 90 L.Ed. 228, 66 S.Ct. 257 (1946), said: "A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which Sec. 811(d) (2) requires in order to avoid the tax." [Note: § 811(d) of the 1939 Code substantially the same as § 2038(a) of 1954 Code.] *Lober, supra*, at p. 337.

Though the purpose of the enactment of the Uniform Act was to avoid the necessity of a complex trust agreement, we think the result is the same where a donor transfers property to himself as custodian and retains, by statute, virtually the same powers as were reserved to settlors in *Holmes* and *Lober, supra*. By appointing himself as custodian, it would seem that the donor is deemed to have adopted the provisions of the Uniform Act as the terms of his conveyance and transfer.

The similarity to a trust is obvious. Indeed the Uniform Act itself speaks in trust language in providing that a custodian "has and holds as powers in trust with respect to the custodial property, in addition to the rights and powers provided in this article, all the rights and powers which a guardian has with respect to property not held as custodial property."

Our Supreme Court in *Bank v. Doughton*, 188 N.C. 762, 125 S.E. 621 (1924), had before it for interpretation the inheritance tax statute which then provided for the taxation of transfers "in contemplation of the death of grantor, bargainor, donor, or assignor, or intended to take effect in possession or enjoyment after such death . . ." There the decedent had transferred to a corporate trustee certain securities in trust for a named beneficiary, reserving the right to revoke, alter, amend, or terminate the trust. He further reserved the right to vote the stock transferred and the trustee could not sell or otherwise dispose of the stock without grantor's consent. The Court in holding the securities includable in his taxable estate said:

"Under the provision that any transfer by deed, grant, sale, or gift, 'made in contemplation of the death of the grantor, bargainor, donor, or assignor, or intended to take effect in possession or enjoyment after such death,' shall be subject

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to a tax for the benefit of the State, it is necessary, in order to escape the tax, to show such a conveyance as parts with the possession, title and enjoyment in the grantor's lifetime. *Reish v. Comrs.*, 106 Pa., 521. And when a transfer is made or intended to take effect in possession or enjoyment after death, and the grantor retains a grasp of the entire estate so long as he lives, as is the case here, it cannot be said absolute possession or enjoyment in the beneficiary takes effect prior to death. Under such conditions, the State is entitled to collect a tax on the transfer. Such is the language of the statute." 188 N.C. at p. 765.

Certainly the present statute is more inclusive and plainly provides for the taxation of the corpus in such a situation.

While we think the ruling of the Internal Revenue Service and decision of the Federal Courts pertinent and the court decisions with respect to trusts analogous and pertinent, we do not rest the decision here on either. Decision here rests upon the clear and unambiguous language of G.S. 105-2(3). We think the Uniform Act accomplishes its purpose and provides a simple vehicle for the use of adults desiring to purchase securities for minors. If a parent donor wishes to avoid inheritance tax on the transfer, he need only choose as custodian one of those persons or corporations allowed by the Act other than himself.

Reversed.

Judges CAMPBELL and PARKER concur.

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STATE OF NORTH CAROLINA v. JERRY NELSON BROWN

No. 715SC641

(Filed 29 December 1971)

**1. Automobiles §§ 3, 125— Uniform Traffic Ticket — sufficiency as a warrant**

Uniform Traffic Ticket used as a warrant sufficiently charged the offenses of driving under the influence of intoxicants and driving while license was suspended.

**2. Criminal Law § 162— failure to object — waiver of objection**

Defendant waived objection to an officer's testimony that defendant admitted that he had drunk five pints of liquor by failing to object when the testimony was offered.

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**3. Criminal Law § 169—admission of evidence elicited by defendant**

Defendant may not complain of evidence elicited by him on cross-examination even if the evidence is prejudicial.

**4. Criminal Law § 169—objection to testimony—same testimony previously admitted without objection**

In a prosecution for drunken driving and driving while license was suspended, the trial court did not err in the admission over objection of an officer's testimony on redirect that defendant admitted he was driving the automobile where the same testimony had previously been elicited on cross-examination by defendant.

**5. Automobiles §§ 3, 127—sufficiency of evidence that defendant was driver**

In this prosecution for drunken driving and driving while license was suspended, the State presented sufficient evidence that defendant was driving the automobile for the cases to be submitted to the jury, where the State's evidence tended to show that defendant was found in an intoxicated condition behind the wheel of an automobile only 30 seconds after the automobile swerved across the road into a ditch and that defendant admitted to an officer that he was driving the automobile.

**6. Criminal Law § 114—statement of contentions—expression of opinion**

Statement by the court in the charge did not constitute an expression of opinion on the evidence where the court clearly informed the jury that it was stating the contentions of the State.

**7. Criminal Law § 118—objections to statement of contentions—waiver**

Objections to the statement of contentions and to the review of the evidence must be made before the jury retires or they are waived.

APPEAL by defendant from *Fountain, Judge*, 24 May 1971 Session of NEW HANOVER Superior Court.

The defendant was charged in a warrant with driving under the influence of intoxicating liquor and driving during revocation of operator's license. The North Carolina Uniform Traffic Ticket was the form used for the warrant.

At the trial the defendant made a motion to quash the warrant and the motion was denied. The defendant entered a plea of not guilty.

The State's evidence tends to show that:

On 27 February 1971, J. H. Temple, H. M. O'Sullivan and a Sgt. Burnett, all deputies of the New Hanover County Sheriff's Department, were on duty driving on Oleander Drive toward Wrightsville Beach at about 11:30 p.m. As they approached an

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intersection, a car heading in the other direction turned across the road in front of them as though to enter a driveway. There was no driveway and the car went into the ditch at the side of the road. The officers stopped about three car lengths from it and got out and went back to the car. The car started backing out of the ditch. After it had backed about one foot, Deputy Temple ordered the driver to stop and he did. Upon arriving at the car, the officers found a man in an intoxicated condition in the right-hand seat and the defendant, Jerry Nelson Brown, sitting behind the steering wheel. It took the officers approximately 30 seconds to stop their car and go back to the car in the ditch. The officers testified that it was dark and they could not see who was driving the car as it turned across the road or as it attempted to back out of the ditch. They saw no one change places in the car.

Within a few minutes after the car entered the ditch, Officer G. W. Kimery of the North Carolina Highway Patrol arrived on the scene and took over the investigation. Officer Kimery testified that defendant smelled of alcohol and was unsteady on his feet. The defendant was belligerent and uncooperative. He was placed under arrest and taken to the sheriff's office. Officer Kimery testified, without objection, that the defendant denied driving the automobile when first questioned about it. On cross examination Officer Kimery testified that, en route to the courthouse, defendant admitted driving the automobile and then denied it at the sheriff's office.

The defendant refused to take a breathalyzer test. Officer Kimery testified that he formed an opinion that defendant was under the influence of an intoxicating beverage. He testified without objection that defendant admitted drinking five pints of liquor.

The State introduced a record from the Department of Motor Vehicles showing that defendant's license was in suspension on 27 February 1971.

The defendant took the stand and testified that he had been drinking all day and riding with a James P. Carroll, who was the owner and driver of the automobile. He testified that at the time the automobile went into the ditch, he was asleep in the back seat. He awoke when the car struck the ditch. He jumped into the front seat and asked Mr. Carroll, "Who was

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driving?" Mr. Carroll replied that it was Charlie. He testified that the police officers arrived at that time and that he did not have time to move the car. He did not know who Charlie was or where he went.

The defendant testified that he admitted driving the car because Officer Kimery kept "hammering and hounding" him.

The defendant made motions to dismiss at the close of the State's evidence and at the close of all the evidence. The motions were denied.

The jury returned a verdict of guilty on both counts and judgment was entered on the verdict.

From the verdict and judgment, defendant appeals.

*Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.*

*Yow and Yow by Lionel L. Yow for defendant appellant.*

CAMPBELL, Judge

The defendant raises four questions on appeal.

1. Was the warrant sufficient to withstand defendant's motion to quash?

2. Did the court err in admitting statements made by defendant to the arresting officer?

3. Did the court err in denying defendant's motions to dismiss at the close of the State's evidence and at the close of all the evidence?

4. Did the trial judge express an opinion on the evidence in his charge to the jury?

When the case came on for trial, the defendant moved to quash the warrant. The State moved to amend the warrant, but the court made no ruling on the State's motion. We therefore, presume the warrant to be in its original form.

The warrant was a North Carolina Uniform Traffic Ticket. Its pertinent parts are as follows:

<u>"Violation</u> <u>Day/Wk.</u>	<u>Mo.</u>	<u>Date</u>	<u>Time</u>	<u>On (Highway</u> <u>No./Street)</u>
Sat.	2	27 1971	11:40 p.m.	US 76
* * * *				

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In the District Court Wilmington, N. C. The affiant, being duly sworn, says that the above-named defendant, on or about the above-stated violation date in the above-named county, did unlawfully and willfully operate the above-described motor vehicle on a street or highway:

- 5. X While under the influence of intoxicating liquor
- 7. X By driving during revocation of operator's license.

In violation of, and contrary to, the form of the statute in such cases made and provided and against the peace and dignity of the State."

The defendant contends that the warrant is defective as to the second count in that the statement of the second count is not complete in itself, the averment that the defendant was driving on a public highway being separated by the first count from the averment that his license had been revoked. The defendant relies on the quotation from *State v. McCollum*, 181 N.C. 584, 107 S.E. 309 (1921) that "in an indictment consisting of several counts that each count should be complete in itself."

[1] We note that the defendant in the instant case was tried on a warrant, not a bill of indictment, and a warrant and the affidavit upon which it is based are tested by rules less stringent than those applicable to indictments. *State v. Teasley*, 9 N.C. App. 477, 176 S.E. 2d 838 (1970). All that is required is that it be sufficient in form to express the charge against the defendant in plain, intelligible, and explicit manner, and to contain sufficient matter to enable the court to proceed to judgment and thus bar another prosecution for the same offense. *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). Warrants should not be quashed for mere refinements or informalities which could not possibly have been prejudicial to the rights of defendants in the trial court. *State v. Hammonds, supra*. The warrant before us fully advised the defendant of the charges against him. All essential elements of the offenses were set forth in the warrant. The defendant could not be prejudiced by being tried on this warrant.

We find no error in the trial court's denial of defendant's motion to quash.

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The defendant assigns as error the trial court's denial of defendant's motions to strike and objections to portions of Officer Kimery's testimony in which the witness stated that defendant had made certain admissions to him. The defendant contends that the arrest of defendant by Officer Kimery was illegal, the crime not having been committed in Kimery's presence, and therefore the defendant's admissions are tainted and inadmissible. A decision in this case does not require us to reach the issues raised by defendant.

[2] The record reveals that the defendant made two crucial admissions to Officer Kimery: 1. that he had had five pints of liquor; and 2. that he was driving the automobile. The defendant did not object or move to strike when Officer Kimery testified that defendant admitted having had five pints of liquor. By not making objection when the testimony was offered, the defendant waived any objection he had to this testimony. *State v. Camp*, 266 N.C. 626, 146 S.E. 2d 643 (1966).

[3, 4] The testimony that defendant admitted driving the automobile was first elicited on cross examination by defendant. On redirect defendant objected to Officer Kimery's testimony that defendant admitted driving the automobile. The objection was overruled, but the testimony was almost identical to that elicited on cross examination. Even if the evidence is prejudicial, the defendant may not complain of evidence elicited by him on cross examination. *State v. Fletcher* and *State v. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Burton*, 256 N.C. 464, 124 S.E. 2d 108 (1962). It is not necessary for us to decide whether it was proper to overrule defendant's objection to Officer Kimery's testimony on redirect examination. The admission of incompetent evidence will not be held prejudicial where substantially the same evidence has been theretofore admitted without objection. *State v. Wright*, 270 N.C. 158, 153 S.E. 2d 883 (1967). Stansbury, N. C. Evidence, 2d Ed., § 30. The admission of Officer Kimery's testimony in this case was not error.

[5] The defendant contends that if the testimony of Officer Kimery is excluded, there is no evidence that defendant was driving the automobile and therefore defendant's motions to dismiss should have been allowed. We have ruled that Officer Kimery's testimony was properly admitted. We have nevertheless examined all the evidence in this case, and we find ample evidence, other than defendant's admissions to Officer Kimery,

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to go to the jury. Construed in the light most favorable to the State, as it must be in ruling on a motion to nonsuit, the evidence shows that defendant was found in an intoxicated condition behind the wheel of an automobile only 30 seconds after the automobile swerved across a highway and into a ditch. On motion to dismiss the State is entitled to the benefit of every reasonable intendment on the evidence and every reasonable inference from the evidence. *State v. Hammonds*, 216 N.C. 67, 3 S.E. 2d 439 (1939). So viewed, there is competent evidence to support the allegation against the defendant, and the case was for the jury. The denial of the defendant's motions to dismiss was proper.

[6] The defendant's final argument is that the trial court expressed an opinion on the evidence through an inaccurate statement of the evidence. The defendant contends that it was prejudicial error for the judge to charge that "he [defendant] either took the car out of gear or cut the motor off." We do not agree. This statement was made while the judge was recapitulating the State's evidence. The judge made it clear to the jury that he was giving the State's contentions by the words "The State has offered evidence which it contends to show that . . . ." A charge which reviews the State's evidence cannot be held erroneous as an expression of opinion that certain facts were fully proven when the court categorically indicated to the jury that it was reviewing the State's evidence. *State v. Rennick*, 8 N.C. App. 270, 174 S.E. 2d 122 (1970).

[7] Objections to the statement of contentions and to the review of the evidence must be made before the jury retires or they are waived. *State v. Saunders*, 245 N.C. 338, 95 S.E. 2d 876 (1957). In the instant case defendant failed to object to the charge at the proper time. Nevertheless, we have considered the statements in question as well as the entire charge. We do not find prejudice in the court's charge.

Defendant having failed to show prejudicial error, the verdict and judgment will not be disturbed.

No error.

Judges MORRIS and PARKER concur.

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## STATE OF NORTH CAROLINA v. DENNIS WALDEN STOCKTON

No. 7123SC748

(Filed 29 December 1971)

**1. Burglary and Unlawful Breakings § 9—possession of burglary tools**

In a prosecution under G.S. 14-55, the State has the burden of proving (1) the possession of an implement of housebreaking (2) without lawful excuse.

**2. Burglary and Unlawful Breakings § 10—possession of burglary tools—sufficiency of evidence**

The State's evidence was sufficient for the jury in this prosecution for unlawful possession of implements of housebreaking where it tended to show that defendant and two companions were at a service station at 2:25 a.m., that the two companions were looking under the raised hood of an automobile and defendant was near some vending machines, that a satchel owned by defendant which was on the back seat of the car contained a gun case, two pairs of gloves, three screwdrivers, a pair of tin snips, a knife, a meat cleaver, a crowbar and five rings of vending machine keys, and that defendant had a .38 caliber pistol on his person.

**3. Constitutional Law § 31—right to be present at trial—waiver**

Defendant on trial for a non-capital felony waived his right to be present during the trial and rendition of the verdict by voluntarily absenting himself after the first day of the trial.

**4. Constitutional Law § 31; Criminal Law § 134—right to be present at sentencing**

A sentence imposing corporal punishment for any crime may not be pronounced against a defendant in his absence.

APPEAL by defendant from *Exum, Judge*, 21 June 1971 Session of Superior Court held in WILKES County.

Defendant was charged in a bill of indictment, proper in form, with the possession, without lawful excuse, of implements of housebreaking, to wit: "keys, knives, metal shears, screwdriver, prise bar and gloves," in violation of G.S. 14-55. He pleaded not guilty.

The evidence for the State tended to show that the defendant and two other men were observed at a service station in the Town of North Wilkesboro at 2:25 a.m. on 9 September 1970 by an officer of the North Wilkesboro Police Department. The two other men were looking under the raised hood of an automobile. (Apparently, there was actually nothing mechanically wrong with this automobile, as it was later driven away by an-

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other police officer.) The defendant was standing near some coin-operated candy, cracker and soft-drink vending machines.

When the officer returned to investigate, he was asked to "give me your damned flashlight" by one of the men standing at the automobile but did not do so at that time. The defendant returned to the automobile from the vicinity of the vending machines but had no soft drink, candy or other product from the vending machines in his hands.

The officer, who had by then been joined by another policeman, saw an open black satchel in the back seat of the automobile and inquired about its ownership. The defendant thereupon voluntarily told the officer that the satchel was his and that it contained "some tools he worked with." The defendant then took the bag out of the car, opened it, and took from it one gun case, two pairs of gloves, three screwdrivers, one pair of tin snips, a knife, one meat cleaver, one crowbar, and five key rings on a large ring. Each key ring contained 15 to 18 keys that "were for drink boxes and cigarette machines and other various types." "Some of the keys were flat and some round and of different shapes." When the defendant removed the keys from the bag, the officer asked him why he had them, and the defendant replied that he had found the keys and the crowbar in the bathroom of a filling station a short time before but he did not remember where. He also informed the officers that he worked for a sheet metal company in Virginia and that "these tools were used on the job."

After the defendant had taken all the articles out of the bag, he was arrested for the unlawful possession of implements of housebreaking, and upon being searched was found to be carrying a .38 snub-nosed revolver, fully loaded, in his right rear pocket.

The other officer, and witness for the State, Robert Kyle, testified that the keys the defendant had in his bag "were returned to the Coca-Cola Company at Mt. Airy." No damage was done to the service station or to any of the machines there.

The defendant did not offer any evidence.

The jury returned a verdict of guilty as charged. The defendant was not present during the second day of the trial or when the verdict was rendered.

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On Friday, 25 June 1971, the judge entered the following order:

"Let the record show that as of Friday morning, June 25, 1971 the defendant, Dennis Walden Stockton, has not been apprehended and his whereabouts are still unknown to the court and to his counsel and the court finds that the defendant through his absence from court has waived his right to be present at the time of sentencing and the court is now ready to impose judgment. \* \* \*"

After hearing from the defendant's attorney, the trial judge sentenced the defendant *in absentia* to not less than two years nor more than five years in prison. Defendant's attorney gave notice of appeal. (The record does not reveal whether the defendant has yet been apprehended.)

*Attorney General Morgan and Associate Attorney Sauls for the State.*

*Charles Neaves, and Porter & Conner by Kurt R. Conner for defendant appellant.*

MALLARD, Chief Judge.

The defendant was not present at the trial after the first State's witness was examined and cross-examined. Nor was he present when the verdict was rendered. Insofar as this record reveals, he is not at this time at a place where the superior court may exercise its jurisdiction over him personally by imposing a proper judgment on the verdict. The question, therefore, could be but has not been raised as to whether the defendant, by fleeing the jurisdiction of the court, has forfeited his right to appeal. See *State v. Keebler*, 145 N.C. 560, 59 S.E. 872 (1907). However, since no motion has been made to dismiss, we consider the appeal. *State v. Williams*, 263 N.C. 800, 140 S.E. 2d 529 (1965); *State v. Dalton*, 185 N.C. 606, 115 S.E. 881 (1923).

[1] The pertinent part of the statute under which the defendant was tried, convicted and sentenced reads as follows:

"If any person . . . shall be found having in his possession, without lawful excuse, any picklock, *key*, bit, or other implement of housebreaking . . ." (Emphasis added.) G.S. 14-55.

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Defendant contends that the trial judge committed error in failing to allow his motion for judgment of nonsuit at the conclusion of the evidence. The essential elements of the crime with which the defendant is charged are (1) the possession of *an* implement of housebreaking (2) without lawful excuse, and the State has the burden of proving both of these elements. *State v. Nichols*, 268 N.C. 152, 150 S.E. 2d 21 (1966); *State v. Morgan*, 268 N.C. 214, 150 S.E. 2d 377 (1966); *State v. Vick*, 213 N.C. 235, 195 S.E. 779 (1938); *State v. Styles*, 3 N.C. App. 204, 164 S.E. 2d 412 (1968). The State in this case was not required to prove that *all* the articles the defendant had in his possession were implements of housebreaking.

[2] Defendant argues that the 75 to 90 keys he had were all designed solely to open vending machines and therefore were not implements of housebreaking. This argument is not persuasive. Moreover, the evidence does not support this argument. It is common knowledge that there are vending machines located inside as well as outside service stations and that keys and crowbars may be used to enter buildings. When the combination of articles possessed by the defendant, the lateness of the hour, the conduct of the defendant and his companions, and the totality of the circumstances in this case are considered, we think there was ample evidence to require submission of the case to the jury. *State v. Nichols, supra*. Furthermore, while some of the articles found in the possession of the defendant might logically be used in his alleged occupation of sheet metal worker, it strains the imagination to suppose that such work properly requires the use of items such as a gun case or a meat cleaver (or of a .38 caliber pistol carried on the person).

Defendant also contends that the trial judge committed error in proceeding with the trial in the absence of the defendant.

The trial started on Monday, 21 June 1971, but was not completed on that date. The defendant had not been placed in custody, and when court reconvened on Tuesday, 22 June 1971, he was not present in the courtroom. Upon inquiry by the judge, the defendant's privately-retained lawyer stated that he had not seen the defendant that morning and had had no communication from him. Thereupon, the trial judge sent the jury out, questioned defendant's attorney, and made the following finding:

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"The court concludes that the trial having begun against Mr. Stockton he having had due notice of the trial and of the convening time of the court this morning and (sic) has waived his right to be here by not being present and the trial should proceed in his absence."

The court issued an *instanter capias* for the defendant, and the trial was resumed, with defendant's attorney participating but in the absence of the defendant. (The record does not reveal whether the defendant was under a bond for his appearance, but it does negative the idea that the defendant was in custody at the beginning of or during the trial.)

The defendant's attorney objected to the trial proceeding in the absence of the defendant but did not at that time or at any time during the trial or during that week offer any explanation for his client's absence, although he was requested by the judge to let him know if he heard anything from the defendant. Moreover, the defendant's attorney did not at the trial and does not in his brief filed in this court make any attempt to explain or excuse the defendant's absence from the trial. After the trial had commenced, the burden was on the defendant to explain his absence.

It is stated that the law in North Carolina is that a defendant charged with a capital crime cannot waive his right to be present at every stage of his trial. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). [*Moore* was decided before the decision of the Supreme Court of the United States in the armed robbery case of *Illinois v. Allen*, 397 U.S. 337, 25 L.Ed. 2d 353, 90 S.Ct. 1057 (1970), rehearing denied, 398 U.S. 915, 26 L.Ed. 2d 80, 90 S.Ct. 1684 (1970).] However, in felonies less than capital, it is well established that a defendant may personally waive his right to be present, and in misdemeanor cases, a defendant's right to be present may be waived by the defendant through his attorney with the consent of the court. *State v. Ferebee*, 266 N.C. 606, 146 S.E. 2d 666 (1966). In cases where a defendant is charged with less than a capital crime, his voluntary and unexplained absence from court after his trial begins constitutes a waiver of his right to be present. *State v. Turner*, 11 N.C. App. 670, 182 S.E. 2d 244 (1971); *Parker v. United States*, 184 F. 2d 488 (4th Cir. 1950); see 23 C.J.S., Criminal Law, § 1008, and 16 C.J.S., Constitutional Law, § 91.

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[3, 4] In this case the defendant, by voluntarily absenting himself after the first day of the trial, waived his right to be present during the trial and the rendition of the verdict. But when a sentence involving corporal punishment is imposed upon a verdict, either on a capital felony charge, a felony charge less than capital, or a misdemeanor, the defendant must be present. *State v. Ferebee, supra*; *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962); *State v. Brooks*, 211 N.C. 702, 191 S.E. 749 (1937); *State v. Cherry*, 154 N.C. 624, 70 S.E. 294 (1911).

The judgment of imprisonment in this case was imposed in the absence of the defendant and is therefore defective. It should be and is hereby set aside and vacated, and this cause is remanded to the superior court in Wilkes County for the imposition of a proper judgment with the defendant present, after his custody is obtained. *State v. Cherry, supra*.

Assignments of error 1, 2, 3, 4 and 6 are not discussed in defendant's brief, and under Rule 28 of the Rules of Practice in the Court of Appeals, they are deemed abandoned.

For the reason heretofore given, the judgment is set aside and the cause is remanded to the end that the superior court may issue proper process to have the defendant brought before it, and that the sentence may be lawfully imposed.

Remanded.

Judges HEDRICK and GRAHAM concur.

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STATE OF NORTH CAROLINA v. EDWIN J. LASSITER AND  
JAMES HENRY BURGESS

No. 711SC637

(Filed 29 December 1971)

1. Hunting § 3—hunting deer by artificial light—prosecution—sufficiency of warrants

Warrants charging that defendants unlawfully and wilfully attempted to take deer with the aid of an artificial light between the hours of sunset and sunrise on a highway and in a field, woodland and forest, *held* sufficient to charge the offense defined by G.S. 113-104 and punishable under G.S. 113-109(b).

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**2. Hunting § 3—hunting deer by artificial light — constitutionality of criminal statutes**

The statutes prohibiting the unlawful taking of deer with the aid of an artificial light between the hours of sunset and sunrise are constitutional. G.S. 113-104; G.S. 113-109(b).

**3. Hunting § 3; Evidence § 4—hunting deer by artificial light — validity of statutory presumptions**

The statutory presumption that the possession of an artificial light and firearms after sunset in an area frequented or inhabited by wild deer shall constitute *prima facie* evidence of the violation of the statute making it unlawful to take game animals in the nighttime with the aid of an artificial light, is held valid, there being a rational connection between the acts raising the *prima facie* evidence rule and the main fact to be proved. G.S. 113-109(b).

**4. Evidence § 4; Constitutional Law § 6—powers of the legislature — creation of *prima facie* rules of evidence**

It is within the power of the General Assembly to change the rules of evidence and, within constitutional limits, to provide that the proof of one fact shall be deemed *prima facie* evidence of a second fact.

**5. Hunting § 3—hunting deer by artificial light — sufficiency of evidence**

In a prosecution charging defendants with the unlawful hunting of deer by artificial light, the issue of the defendants' guilt was properly submitted to the jury, where there was evidence that (1) the defendants, between sunset and sunrise, were shining a light over 50 feet from a highway into a field, woodland and forest, and (2) the defendants were in possession of firearms and in an area frequented by deer.

APPEAL by defendants from *Peel, Judge*, 22 March 1971 Session of Superior Court held in GATES County.

These cases have been before this Court previously upon an appeal by the State from a judgment of the Superior Court which quashed the two warrants. Therefore, for background facts see 9 N.C. App. 255, where this Court reversed the judgment of the Superior Court of Gates County.

Upon the motions of the defendants, the actions were remanded to the Gates County District Court.

At the 2 November 1970 Session of the Gates County District Court, Horner, Judge Presiding, the State moved to amend the warrants. These motions were allowed.

The amended warrants against defendants charged that on or about 29 November 1969 they "did unlawfully and wilfully

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attempt to take deer with the aid of an artificial light between the hours of sunset and sunrise on a highway and in a field, woodland and forest, contrary to the form of the statute 113-104. . . ."

Defendants were convicted in District Court and appealed to Superior Court. Before pleading to the warrants in Superior Court, defendants moved to quash the warrants as amended, which motions were overruled. After entering pleas of not guilty, the defendants were tried before a jury.

The State offered evidence which, in brief summary, tends to show: At approximately 1:50 a.m., 29 November 1969, two North Carolina Wildlife Protectors, Mr. Elks and Mr. Willis, observed the defendants' car stopped on Rural Road No. 1202 beside a corn field. Someone in the car raked the field and woods in a very slow manner with a strong light that threw a beam approximately 200 feet. The car backed up very slowly with the light flashing across the field on the left-hand side of the car. A short time later the light began spotting the field on the right-hand side of the car in the same manner. The officers observed that James Burgess was the driver and Edwin Lassiter was a passenger. A loaded pump shotgun and a 22 caliber lever action rifle were found in the car along with a spotlight which was plugged into the car's cigarette lighter. Protector Elks testified that he had observed deer in these fields approximately a half dozen times on other occasions, and as recently as the week before.

The State's evidence further tended to show that defendants admitted that they were trying to kill a deer.

The defendants offered no evidence.

The jury returned a verdict of guilty as charged; whereupon the defendants were sentenced to six months in the common jail of Gates County, sentences suspended upon a payment by each defendant of a fine of \$250.00. From this judgment the defendants appealed.

*Attorney General Morgan, by Associate Attorney Kane, for the State.*

*Jones, Jones & Jones, by L. Herbin, Jr., for defendants.*

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BROCK, Judge.

[1] The defendants-appellants argue that the trial court committed error in failing to quash the amended warrants against the defendants upon their motions.

We hold that the amended warrants were sufficient to survive motions to quash. The warrants clearly charged a criminal offense created by and defined by G.S. 113-104.

G.S. 113-104 provides in pertinent part that “. . . [g]ame birds and game animals shall be taken only in the daytime, between sunrise and sunset, . . .” and that “. . . [n]o person shall take any game animals . . . by aid of or with the use of any jacklight, or other artificial light . . .”

By G.S. 113-83, deer is defined as a “game animal.” G.S. 113-83 also defines “take” to mean the pursuit, hunting, capture or killing of birds or animals. Thus, one violates G.S. 113-104 when he pursues or attempts to kill a deer by aid of or with the use of any artificial light, because this activity falls within the statutory definitions of “taking” and “game animal.”

A conviction of the offense of taking, or attempting to take deer other than in the daytime, and with the use of an artificial light, as prohibited by G.S. 113-104 is punishable under the provisions of G.S. 113-109. At the time alleged in the warrant, G.S. 113-109(b) provided: “Any person who takes or attempts to take deer between sunset and sunrise with the aid of a spotlight or other artificial light on any highway or in any field, woodland, or forest, in violation of this article shall, upon conviction, be fined not less than two hundred fifty dollars (\$250.00) or imprisoned for not less than ninety days.”

This provision of G.S. 113-109(b) does not create a distinct or separate criminal offense from that created and defined by G.S. 113-104. Rather, G.S. 113-109(b) merely provides a greater punishment when the stated conditions are shown and proved by the State. This is similar to the relationship of the offense of common-law robbery to that of robbery with firearms or other dangerous weapons (G.S. 14-87). The primary purpose and intent of the legislature in enacting G.S. 14-87 was to provide for more severe punishment for the commission of robbery when such offense is committed or attempted with the use or threat-

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ened use of firearms or other dangerous weapons. See *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971).

We hold that the warrants allege facts which constitute a criminal offense under G.S. 113-104 which is punishable under G.S. 113-109(b).

[2] The defendants further contend that the pertinent portions of North Carolina General Statutes, Chapter 113, Section 104 and 109(b) under which defendants are charged are unconstitutional on their face and as applied. Defendants also contend these statutes are unconstitutionally vague, uncertain and ambiguous. G.S. 113-104 and the first sentence of G.S. 113-109(b) are clear and definite as to the persons within the scope of the statutes and the acts which are penalized. G.S. 113-104 and the first sentence of G.S. 113-109(b) have the purpose of controlling and managing the use and methods of taking wildlife—a part of our natural resources, which are of vital interest to this State's citizens. These laws, protecting and managing wildlife, are within the legitimate interests of the State and in the public interest. They are constitutional and this part of defendants' argument is feckless. See *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961).

[3] The defendants also contend that the prima facie evidence rule of G.S. 113-109(b) is unconstitutional due to vagueness and because it deprives them of their right to the presumption of innocence until proven guilty by due process of law. We do not agree. We hold the prima facie evidence rule of G.S. 113-109(b) is constitutional. See *State v. Hales*, *supra*.

The prima facie evidence rule of G.S. 113-109(b) is as follows:

“ . . . In any locality or area which is frequented or inhabited by wild deer, the flashing or display of any artificial light from roadway or public or private driveway so that the beam thereof is visible for a distance of as much as fifty feet from such roadway or driveway, or the flashing or display of such artificial light at any place off such roadway or driveway, when either of such acts is accompanied by the possession of a firearm or a bow and arrow during the hours between sunset and sunrise, shall constitute prima facie evidence of a violation punishable under the provisions of the preceding sentence.”

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[4] It is well settled in this State that it is within the power of the General Assembly to change the rules of evidence and, within constitutional limits, to provide that the proof of one fact shall be deemed prima facie evidence of a second fact. *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548 (1967).

In *Milk Commission*, *supra*, Justice Lake said, "... it is now also well established in this State, and in other jurisdictions, that the exercise of such power by the Legislature is subject to the limitation that there must be such relation between the two facts in human experience that proof of the first may reasonably be deemed some evidence of the existence of the second." Therefore, the test to be applied to the prima facie evidence rule of G.S. 113-109(b) in order for it to be constitutional is that there be a rational connection between the fact proved and the ultimate fact presumed so that the inference of the one from proof of the other is not unreasonable and arbitrary. See Annot. 162 A.L.R. 495; Annot. 13 L.ed. 2d 1138.

[3] We hold that the prima facie evidence rule of G.S. 113-109(b) meets the requirements of the "rational connection rule." There is a fair relation between the acts which raise the prima facie evidence rule and the main fact to be proved. The main fact being that the defendants were attempting to take wild deer between sunset and sunrise with the aid of artificial light. The presumption of G.S. 113-109(b) has a rational, real, and substantial relation to the end sought to be accomplished, which is the protection of deer from the unfair hunting or wholesale slaughter by man.

Legislation creating statutory presumption of the type here before us have been almost uniformly upheld by the highest state and Federal courts on numerous occasions. See Annot. 81 A.L.R. 2d 1093; 162 A.L.R. 495; 35 Am. Jur. 2d, Fish and Game, § 53.

We think G.S. 113-109(b) does not deprive the defendants of their right to the presumption of innocence until proven guilty or due process of law. There is no ground for holding that due process of law has been denied defendants if a legislative provision, not unreasonable in itself, prescribing a rule of evidence in criminal cases does not shut out from the parties affected a reasonable opportunity to submit to the jury in their

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defense all the facts bearing upon the issue. The presumption before us is not conclusive upon the jury; they may still under the law return a verdict in favor of the defendants. *State v. Person*, 56 Wash. 2d 283, 352 P.2d 189, 81 A.L.R. 2d 1088; *Williams v. State*, 239 So. 2d 583 (Fla.); 29 Am. Jur. 2d, Evidence, § 9.

Thus, when the State produced evidence that defendants had an artificial light and firearms in their possession after sunset in an area which was frequented or inhabited by wild deer, the State had then shown, *prima facie*, a violation of the statute. The statute did not shift the burden of proof from the State to the defendants, or deprive them of the presumption of the innocence which remained with them until overcome by evidence of guilt beyond a reasonable doubt. *State v. Person, supra*.

[5] Besides the question of constitutionality of the statutes involved, the defendants contend the trial court committed error in failing to allow the defendants' motions for nonsuit. We think the trial court was correct. Under the G.S. 113-109(b) *prima facie* evidence rule, which permits the matter to go to the jury, the court properly denied the motions for nonsuit. Further, even without the benefit of the *prima facie* evidence rule of G.S. 113-109(b), the record clearly discloses sufficient evidence to support a verdict by the jury that the defendants had violated the law. This was a result of the State's evidence given by Wildlife Protector Elks, who testified, among other things, that: (1) the defendants were shining a light over 50 feet from a highway into a field, woodland and forest, (2) between sunset and sunrise, (3) they both were in possession of a firearm, (4) in an area frequented by deer. This, in conjunction with the defendants' confessions, was sufficient grounds to deny a motion for nonsuit. Defendants' assignments of error relating to the question of nonsuit are without merit.

The defendants' further assignments of error relate to the judge's charge to the jury. We have examined each of these carefully and find they are without merit.

No error.

Judges BRITT and VAUGHN concur.

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## STATE OF NORTH CAROLINA v. ROBERT LEE THACKER

No. 7110SC712

(Filed 29 December 1971)

1. Criminal Law § 75— indigent defendant — absence of counsel and written waiver — admission of confession — harmless error

The trial court in this prosecution for felonious assault erred in the admission of an in-custody confession made by an indigent defendant in March 1971 when he was not represented by counsel and had not executed written waiver of counsel; however, such evidence was harmless beyond a reasonable doubt in light of the State's other evidence of defendant's guilt and the cumulative effect of the confession.

2. Assault and Battery § 5— inference of intent to kill

An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

3. Assault and Battery § 16— failure to submit lesser degrees

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the trial court did not err in failing to instruct the jury on the lesser included felony of assault with a deadly weapon per se inflicting serious injury as provided by [former] G.S. 14-32(b) where there was no evidence to support a lesser offense, notwithstanding the court did submit the lesser offenses of assault inflicting serious injury and assault with a deadly weapon.

4. Criminal Law § 66— one-man lineup at hospital — in-court identification — independent origin

In this prosecution for felonious assault, the victims' in-court identifications of defendant were based upon what they observed at the crime scene and were not tainted by a one-man lineup conducted in a hospital emergency room.

5. Criminal Law §§ 66, 87— origin of in-court identification — leading question

The trial court did not abuse its discretion in allowing the solicitor to ask assault victims whether they were basing their in-court identifications of defendant "on who you saw at the FCX Store at the time you were cut or the one that you saw at the hospital."

APPEAL by defendant from *Hall, Judge*, 21 June 1971 Session of WAKE Superior Court.

By separate indictments proper in form defendant was charged with assault with a deadly weapon, a knife, with intent to kill inflicting serious injury not resulting in death. In one

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indictment Brenda Gail Waddell was named as the victim and in the other Swain Pierce was named as the victim. The cases were consolidated for trial.

The evidence for the State tended to show: Around 8 a.m. on 10 March 1971, defendant entered an office of FCX on Blount Street in the City of Raleigh and asked permission of Brenda Gail Waddell, the sole occupant of the office, to use the telephone. Before leaving the office defendant grabbed Miss Waddell and when she began screaming told her, "if you don't stop screaming, I will stab you." He proceeded to stab Miss Waddell with a knife in her arm and stomach and also cut her finger when she was attempting to defend herself. He thereupon released Miss Waddell and exited by a side door of the office that opened into a garage. At that point Swain Pierce was coming out of a restroom and saw the defendant in front of him running through the garage. The defendant told Mr. Pierce, "there is a man jumped on a woman in that room right over there." Miss Waddell opened the side door and screamed, "Help," to Mr. Pierce. She was very bloody and Mr. Pierce exclaimed, "Oh, my God," and started screaming, "Help." At this point defendant lunged upon Mr. Pierce and stabbed him under the left arm partially collapsing his lung. Defendant then ran out into the alley. Shortly thereafter a man, later identified as defendant, fell through the skylight of the building next to the FCX Store where the stabbings occurred. He was observed falling by the manager of the H & H Tire Co., occupant of the building where defendant fell. Defendant was injured in the fall. A fire escape led from the alley near the FCX to the roof of the Tire Company building. Police were called, investigated, and found a knife scabbard with blood all over it about five feet from where defendant had fallen and landed. It was not there prior to defendant's fall. The police found a green jacket on top of the building about 14 feet from the skylight. Prior to this investigation, defendant was advised of his rights and placed under arrest for breaking and entering the Tire Company building.

Neither of the victims had ever seen defendant before that morning when they were assaulted. Both Miss Waddell and Mr. Pierce described the defendant as wearing a green jacket and work trousers of either a dark or gray color. The victims, Pierce and Waddell, were taken to the hospital and police took

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the defendant to the hospital emergency room where both victims identified him as their assailant.

Defendant did not present any evidence.

The jury found defendant guilty as charged in the case concerning Brenda Gail Waddell and guilty of assault inflicting serious injury in the case concerning Swain Pierce. The court sentenced defendant in the Waddell case to serve a term of not less than nine years nor more than ten years in the State Prison and a consecutive sentence of two years in the Wake County Jail in the Pierce case. From these judgments, the defendant appealed.

*Attorney General Robert Morgan by Associate Attorney Benjamin H. Baxter, Jr., for the State.*

*Robert E. Smith for defendant appellant.*

BRITT, Judge.

[1] Defendant first assigns as error the admission into evidence of a written confession made by him while in custody a short while after the offenses were committed. He contends that he was and is an indigent, that he was not represented by counsel at the time of making the confession, and that he did not execute a written waiver of counsel as required by G.S. 7A-457. It is clear that the confession should have been excluded because of the written waiver of counsel proviso of G.S. 7A-457 in effect at times pertinent to this case. *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971). (Note: This statute was amended by Ch. 1243 of the 1971 Session Laws). However, we hold that the error was harmless beyond a reasonable doubt, thus does not require a new trial.

In the recent case of *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971), it was held that the admission of statements made by defendant in that case identifying articles of clothing found near the scene of the crime that were covered with blood of the same type as the deceased, even though defendant had not signed a written waiver of counsel as required by *State v. Lynch*, *supra*, was not such error as to require a new trial. "The question is whether there is a possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963). The court went on to state in *Doss*, *supra*, at 423-424 after

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summarizing other evidence establishing the clothing as defendant's that "(i)n light of this evidence identifying the clothing and the overwhelming evidence of defendant's guilt presented by the State, we hold that this error was clearly harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399 (1971); *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970)."

In the present case there is evidence of identification of defendant by the two victims and the employee of the establishment where defendant fell through the skylight. A bloody knife scabbard was found where defendant fell, a green coat that defendant was wearing at the time of the stabbings was found about 15 feet from the skylight where defendant fell. The only statement made in the confession which is not absolutely cumulative was the statement that, "I decided to kill the first person I caught by their self." However, it is well settled in this jurisdiction that intent to kill may be inferred or presumed from the nature of the assault and attendant circumstances. 1 Strong, N.C. Index 2d, Assault and Battery, Sec. 5, p. 298.

[2] Intent to kill is a mental attitude which ordinarily is proven by circumstantial evidence, and such intent may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. *State v. Cauley*, 244 N.C. 701, 94 S.E. 2d 915 (1956). Intent to kill Miss Waddell in the case at bar was strongly evident from the number of times defendant stabbed and attempted to stab her and the areas of her person that he stabbed. Medical testimony regarding Miss Waddell's injuries disclosed that a large artery in her arm was severed resulting in loss of considerable blood; the stab wound in her abdomen completely traversed her abdominal wall—some four inches—in the area of vital organs including her stomach, intestines, liver and spleen; the cut on her finger divided an artery and a vital nerve. She underwent surgery in the hospital and was treated there for six days. Therefore, since the confession was merely cumulative and in light of the evidence presented by the State, we hold that the admission of the confession although error was harmless error beyond a reasonable doubt.

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[3] Defendant assigns as error the failure of the court to instruct the jury in the Waddell case as to the lesser included felony of assault with a deadly weapon per se inflicting serious injury as provided by G.S. 14-32(b) prior to enactment of the 1971 amendment. This assignment of error is without merit.

In both cases, the court instructed the jury that it could return one of four verdicts: (1) guilty as charged, (2) guilty of assault inflicting serious injury, (3) guilty of assault with a deadly weapon, or (4) not guilty. In *State v. Lamm*, 232 N.C. 402, 61 S.E. 2d 188 (1950), the court in an opinion by Winborne, J., (later C.J.) said:

In this State it is a well recognized rule of practice that where one is indicted for a crime and under the same bill it is permissible to convict the defendant of 'a less degree of the same crime,' G.S. 15-170, and there is evidence tending to support a milder verdict, the prisoner is entitled to have the different views presented to the jury, under a proper charge. *S. v. Robinson*, 188 N.C. 784, 125 S.E. 617; *S. v. Staton*, 227 N.C. 409, 42 S.E. 2d 401. But where there is no evidence to support such milder verdict, the court is not required to submit the question of such verdict to the jury.

While the trial court in the Waddell case charged the jury on two lesser offenses, we do not think under the evidence presented that defendant was entitled thereto. The uncontradicted evidence hereinbefore review overwhelmingly supported the offense of assault with a deadly weapon with intent to kill inflicting serious injury and there was no evidence to support a milder verdict. The assignment of error is overruled.

[4] In his last assignment of error, defendant contends the court erred in admitting into evidence the in-court identification of defendant and "allowing the solicitor to suggest to witnesses the basis of their identification." Defendant objects to the identification for that shortly after his arrest he was taken to the hospital emergency room and identified there by the two victims of his attack.

In *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967), the Supreme Court held that a defendant was not denied due process by a "one-man" lineup. The legality of the identification process depends on the totality of the surrounding circumstances. Here, neither of the victims could go to

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the police station for the usual lineup, as they were both being treated for their stab wounds. Even granting establishment of some primary illegality (which is not the case under the circumstances here), although one-man lineups are not to be encouraged, the evidence presented in the instant case was not procured by the exploitation of any illegality but instead by the original viewing of the defendant at the scene of the crime by means sufficiently distinguishable to be purged of any primary taint. *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963).

[5] As for the solicitor asking the witnesses, "Are you basing your identification here in court today on who you saw in the FCX Store at the time you were cut or the one that you saw at the hospital?", it is settled law that leading questions are in the discretion of the trial judge. *State v. Beatty*, 226 N.C. 765, 40 S.E. 2d 357 (1946). The assignment of error is overruled.

Upon a careful review of the entire record, we find no error sufficiently prejudicial to warrant a new trial.

No error.

Judges BROCK and VAUGHN concur

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STATE OF NORTH CAROLINA v. NATHANIEL LEE PERRY, JR.

No. 7114SC691

(Filed 29 December 1971)

1. Constitutional Law § 31— identity of informant

In this prosecution for felonious breaking and entering, the trial court did not err in refusing to compel the State to disclose the identity of a confidential informant who gave the police information that the crime was going to be committed, where there was no evidence of entrapment and there was sufficient evidence of defendant's guilt of independent origin from the informant's tip.

2. Criminal Law § 66— identity of defendant — sufficiency of evidence

Evidence of defendant's identity as the driver of a getaway car which waited outside a home that had been broken and entered was properly submitted to the jury, where a police officer testified that he had known defendant for 12 years and that he recognized defendant as the driver of the automobile when defendant looked directly at him while he was 20-25 feet away and again when he was 150 feet away.

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**3. Burglary and Unlawful Breakings § 5— intent to commit larceny — sufficiency of evidence**

The evidence was sufficient to support a jury finding that defendants broke into and entered a home with the intent to commit larceny therein, notwithstanding defendants were apprehended by police officers immediately after entering the home and thus had no opportunity to steal any property.

**4. Criminal Law § 112— instructions — reasonable doubt — possibility of innocence**

Construing the jury charge contextually, the trial court did not commit prejudicial error in defining reasonable doubt as a "possibility of innocence" in one part of the charge where throughout the charge the court instructed the jury they must be convinced of defendant's guilt beyond a reasonable doubt.

APPEAL by defendant from *Hobgood*, Judge, 5 April 1971 Session of Superior Court, DURHAM County.

The defendant, Nathaniel Lee Perry, Jr., and three others were charged under an indictment, proper in form, with breaking and entering the dwelling of Eugene Bartlett in Durham, North Carolina, on 4 March 1971 with the intent to commit the felony of larceny in violation of G.S. 14-54(a). Defendant entered a plea of not guilty and the others entered pleas of guilty. The jury found defendant guilty of felonious breaking and entering, and he was sentenced to not less than eight nor more than ten years in prison. From the judgment of the court, defendant appealed.

*Attorney General Morgan, by Associate Attorney Payne, for the State.*

*William H. Murdock and Felix B. Clayton for defendant appellant.*

MORRIS, Judge.

The evidence for the State tends to show that Dr. Eugene Bartlett and his family lived in a home located 1/4 of a mile down a private driveway off Infinity Road in Durham County. There are three other houses located on the same private driveway. Durham County Deputy Sheriff Utley phoned the Bartletts on 3 March 1971 and told them that based upon information from a confidential informant, he believed that their house was going to be broken into. The police suspected that someone would try to steal a valuable collection of firearms kept by Dr. Bartlett in his home. Deputy Utley asked permission to attempt to ap-

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prehend the people who were going to break in by setting up a stakeout in the Bartlett house the next morning. Deputy Utley and Detective Martin of the Durham Police Department arrived at the house before 8:00 a.m. on 4 March 1971, and Dr. Bartlett then left with his children. After the officers had arrived, the phone rang once, Mrs. Bartlett answered and the caller hung up without saying anything. The State's evidence shows that there is a public telephone booth about  $1\frac{1}{2}$  miles away from the Bartlett home. Five minutes later at about 8:30 a.m., Mrs. Bartlett and her mother left. Deputy Utley and Detective Martin were left alone in the house and hid in a bathroom off the kitchen. At about 10:15 a.m. the telephone rang nine times and approximately 15 minutes later, the phone rang 15 more times. The officers didn't answer the phone either time. About five minutes later, the officers heard a car in the driveway and then the doorbell rang eight or ten times. Soon thereafter, they heard glass breaking, the back door opening and people entering the house. A few seconds later, Deputy Utley and Detective Martin stepped out from the bathroom into the kitchen where they observed three men. Holding shotguns, the officers told the three suspects to freeze but one of them ran outside. Detective Martin gave chase and when he was 25-30 feet away, pointed his shotgun at the man who fell to his knees, threw his arms over his head and said "Oh, God, don't shoot me." While outside the house, Detective Martin observed a gold Pontiac G.T.O. automobile parked in the driveway 20-25 feet away. Detective Martin saw a man under the steering wheel with his head turned over his shoulder looking directly at him through the side window and identified him as the defendant. The automobile immediately took off at a high rate of speed down the private driveway and as he made the left turn onto Infinity Road approximately 150 feet away, the driver turned and again looked directly at Detective Martin. Detective Martin had known the defendant for 12 years, had seen defendant drive a gold Pontiac G.T.O. on previous occasions and was positive he recognized the defendant on the day in question.

Detective Utley heard the automobile leave at a rapid rate of speed, but he was inside the house and never saw the occupant of the car. A neighbor who lives about one block away from the Bartlett house saw a gold colored automobile with four men in it pass by slowly going towards the Bartlett house at about 10:30 in the morning. Five minutes later she saw the

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same car coming from the direction of the Bartlett house at a high rate of speed down the private driveway with only one man in it. The defendant presented no evidence, and his motions for nonsuit were denied.

[1] Defendant assigns as error the refusal of the court to compel disclosure of the confidential informant's identity and the content of his communications. In order to sustain a conviction for felonious housebreaking, the State must prove an unlawful breaking or entering of the dwelling house of another with the intent to commit a felony or other infamous crime therein. *State v. Cook*, 242 N.C. 700, 89 S.E. 2d 383 (1955). Defendant contends that the "felonious intent" in this case can only be proved by information supplied by the unidentified informant; and that according to *State v. Fletcher* and *State v. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971), disclosure of the informant's identity is essential to lessen the risk of false testimony by him. In *Fletcher*, *supra*, both defendants relied upon the defense of entrapment to support their assignment of error. Here the defendant contends that he knew nothing about the robbery. By denying his guilt, defendant's case is factually distinguishable from that of *Fletcher*, *supra*, and *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399 (1971), appeal dismissed 402 U.S. 1006, 29 L.Ed. 2d 428, 91 S.Ct. 2199, applies instead, wherein the Court, through Justice Moore, said:

"It is the general rule, subject to certain exceptions and limitations . . . that the prosecution is privileged to withhold from an accused disclosure of the identity of an informer.' (Citation omitted.) 'The privilege is founded upon public policy, and seeks to further and protect the public interest in effective law enforcement. It recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers, and by preserving their anonymity, encourages them to perform that obligation. The privilege is designed to protect the public interest, and not to protect the informer.' (Citation omitted.) The propriety of disclosing the identity of an informer depends on the circumstances of the case. (Citations omitted.)" At p. 608.

There was no evidence of entrapment in this case, and there is sufficient evidence of defendant's guilt, which is of an in-

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dependent origin and not from the informant's tips, to convict him. Thus under the circumstances of this case we hold that the refusal of the court to disclose the identity of the informant was proper. This assignment of error is overruled.

[2] Defendant also assigns as error the court's refusal to grant motions of nonsuit at the end of the State's evidence and at the end of all the evidence. It is well settled that upon a motion for nonsuit in a criminal action, the evidence must be interpreted in the light most favorable to the State and all reasonable inferences favorable to the State must be drawn from it. *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967), and cases cited therein. The facts here tend to show that the witness Martin had known the defendant for 12 years prior to the time of this particular incident; that he was approximately 20-25 feet away from the defendant when he first saw him; and that he was 150 feet away when defendant stared at him a second time. The court properly allowed the jury to determine the weight to be given to Martin's testimony. *State v. McClain*, 4 N.C. App. 265, 166 S.E. 2d 451 (1969).

[3] To withstand the motion for nonsuit, there must also be substantial evidence of all material elements of the offense, and it is immaterial whether the substantial evidence be circumstantial or direct or both. *State v. Jacobs*, 6 N.C. App. 751, 171 S.E. 2d 21 (1969). The defendant contends that there was not sufficient evidence of felonious intent to go to the jury. "If a person breaks or enters . . . with intent to commit the crime of larceny he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent. . . . (H)is criminal conduct is not determinable on the basis of the success of his felonious venture." *State v. Nichols*, 268 N.C. 152, 154, 150 S.E. 2d 21, 22-23 (1966). In this case there was enough evidence of the material elements of the crime to submit the case to the jury, and the motions for nonsuit were properly denied.

[4] The court in charging the jury gave the following instructions:

"All the evidence has been presented, you have heard the able arguments of counsel representing the defendant and the Solicitor representing the State. This defendant Nathaniel L. Perry has entered a plea of not guilty. The fact that he has been indicted as charged is no evidence of his

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guilt. Under our system of justice if a defendant pleads not guilty *he is not required to prove his innocence. He is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.*

(When I speak of reasonable doubt I mean a possibility of innocence based on reason and common sense arising out of some or all of the evidence that has been presented, or lack of evidence, as the case may be.) EXCEPTION No. 8.

If after weighing and considering all of the evidence you are fully satisfied and entirely convinced of the defendant's guilt, you would be satisfied beyond a reasonable doubt. On the other hand, if you have any doubt based on reason and common sense arising from the evidence in the case or the lack of evidence as to any fact necessary to constitute guilt, you would have a reasonable doubt and it would be your duty to give the defendant the benefit of that doubt and to find him not guilty." (Emphasis supplied.)

The court properly instructed the jury concerning aiding and abetting, and throughout his charge, instructed them that they must be convinced of defendant's guilt beyond a reasonable doubt. The defendant assigns as error that portion of the charge above which defines reasonable doubt, contending that by defining it in terms of a "possibility of innocence," the court has shifted the burden of proof from the State to the defendant. In the absence of a request by the defendant, the court is not required to define reasonable doubt. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Potts*, 266 N.C. 117, 145 S.E. 2d 307 (1965). Our Supreme Court has said that when the trial judge undertakes to define the term reasonable doubt, the definition should be in substantial accord with definitions approved by them, but that the law does not require any set formula in defining reasonable doubt. *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). Construing the entire charge contextually, we find that the charge as a whole to be correct and not prejudicial to the defendant. *State v. Gatling*, 275 N.C. 625, 170 S.E. 2d 593 (1969), and cases cited therein. Defendant's exception to the charge is overruled.

We have carefully examined and considered defendant's other assignment of error and find it to be without merit.

Affirmed.

Judges CAMPBELL and PARKER concur.

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State v. Berry

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## STATE OF NORTH CAROLINA v. AUGUSTUS L. BERRY

No. 7118SC735

(Filed 29 December 1971)

**1. Assault and Battery § 5— assault on police officer with firearm — sufficiency of evidence**

The State's evidence was sufficient for the jury in this prosecution for assaulting a police officer with a firearm in violation of G.S. 14-34.2 where it tended to show that a shot fired from a hotel struck the patrol car the officer was driving, that a rifle owned by defendant was found in a closet just outside a room rented by defendant in the hotel, and that a bullet found in the patrol car had been fired from defendant's rifle.

**2. Constitutional Law § 30— speedy trial**

Defendant was not denied his constitutional right to a speedy trial by a delay of some 17 months between his arrest and trial, the State having been granted four continuances during that time, where the record reveals legitimate and reasonable excuses for the delay, and defendant has failed to show that the delay was due to the neglect or wilfulness of the State or that he was prejudiced thereby.

APPEAL by defendant, Augustus L. Berry, from *McConnell, Judge*, 31 May 1971 Session of Superior Court held in GUILFORD County.

The defendant, along with Edward Michael Smith, Bradford Belcher and Harry Fontleroy, was charged in a single two-count bill of indictment with conspiracy to assault a law-enforcement officer, and with assaulting a law-enforcement officer with a firearm, in violation of G.S. 14-34.2. The defendant, Augustus L. Berry, was tried alone on the two counts in the bill of indictment. Upon the defendant's plea of not guilty, the State offered evidence which is reviewed in the opinion. The defendant offered no evidence. The jury found the defendant guilty of both counts in the bill of indictment.

On 11 June 1971 the trial judge continued prayer for judgment until 6 September 1971 on the count in the bill of indictment wherein the defendant was charged with conspiracy to assault a law-enforcement officer.

From a judgment on the verdict imposing a prison sentence in the count in the bill of indictment charging the defendant with assault on a law-enforcement officer with a firearm, the defendant appealed to this Court.

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*Attorney General Robert Morgan and Associate Attorney Ronald M. Price for the State.*

*Smith and Patterson by Norman B. Smith, Michael K. Curtis and J. David James for defendant appellant.*

HEDRICK, Judge.

[1] The defendant urges as error the court's denial of his motion for judgment as of nonsuit. In the second count charging the defendant with assaulting an officer with a firearm, the State offered evidence (except where quoted) tending to show the following: On 12 December 1969, at about 12:45 a.m., Ralph Tucker, an Officer with the Patrol Division of the Greensboro Police Department, was on duty patrolling the Greensboro City streets in a patrol car. As the officer drove the patrol car west along Friendly Avenue approaching Davie Street, he "heard something that sounded like a gunshot or firecracker." When the officer heard the noise the driver's side of the automobile was facing the north side of the King Cotton Hotel. As the officer proceeded to drive the automobile along the street, he heard another shot which he said he believed came from the middle of the King Cotton "on up toward the left side." The second shot hit the glass in the rear door of the car on the driver's side. Officer Tucker found a bullet in the automobile. According to Officer Tucker's testimony, about half or more of the King Cotton Hotel and between 72 and 84 of its windows were visible from where he was when the shot was fired. Forty-five minutes after Officer Tucker reported the shooting incident and the damage to the patrol car, police officers went to the fourteenth floor of the King Cotton Hotel where they heard boisterous laughter emanating from room 1404. When someone opened the door from inside the room, the officers entered and learned that the room was being rented by the defendant. One of the police officers testified that from a window in the defendant's room he could look straight into Friendly Avenue at the Daily News Building. When the officers asked the defendant for permission to search his room, the codefendant Edward Michael Smith, who was not tried with the defendant Berry, asked the officers if they had a search warrant. The officers again asked the defendant Berry if they might search his room, and the defendant Smith again asked if they had a warrant. The officers then explained that since the defendant Berry

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rented the room, they were asking him for permission to search; whereupon, the defendant Berry asked the officers what they were looking for. When the officers explained that they were looking for a rifle, the defendant Berry told them that he did not have a gun and that they could search his room. The officers did not find a gun in the defendant's room; however, one of the officers found a loaded .22 rifle in a small service closet in the hall just outside the door to the defendant's room which the officers took to the police station without the defendant's knowledge.

At 2:30 p.m., on 12 December 1969, the defendant Berry and Harry Fontleroy, a codefendant not tried with the defendant Berry, went to the Greensboro Police Station where they talked to Major Edmond Robert Wynn, Commanding Officer of the Patrol Division of the Greensboro Police Department. Major Wynn testified: "They identified themselves as Augustus Berry—and said he lived at 1404 King Cotton Hotel. And the other person said he was Harry Fontleroy and he resided at A & T and both were A & T students. . . . At this time I asked him what his complaint was. And he said, 'Well, they took my gun.'

\* \* \*

"At that time I asked Mr. Berry if he would describe the gun. And he described it as being a rifle, a Marlin .39A. He said it had rust spots on it and chipped butt plate, that is, at the end of the rifle. And he mentioned that there was something wrong with the right front sight. And he also mentioned that it was a lever action type gun.

"He asked if we had the gun and could he have it back, and I asked him, 'Why,' and he stated that it was his gun. I told him that this gun was being held and would be processed and ultimately we would make some decision on it.

\* \* \*

" . . . I asked him later on why he was making a complaint—why he had come up here, he said he wanted to help with matters, and I asked him, 'Along what line,' and he said he wanted to get the matter straightened out. I then asked him if the officers talked to him about the gun the night before, and he said, 'Yes, they did.' And I asked, 'What did you tell them about that.' And he said, 'I lied.' And I asked, 'About what,' and he said, 'I lied about the fact I did not have a gun.'

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"As to whether he explained why he had lied to the officers the night before about the gun, he said he was mad; that he was mad about the fact that they had come to his room; that he was mad about the fact they had come into his room, and also mad about the fact that one of the officers had a shotgun.

\* \* \*

"As to whether at that point, there was any conversation about the other persons in the room at the time the officers came there, Fontleroy said he was the second party and they had been in the room during the entire evening. . . ."

A Federal Bureau of Investigation ballistics expert testified that he test fired the Marlin .22 rifle taken from the closet outside the defendant's door in the King Cotton Hotel and compared the test bullet with the bullet found by Officer Tucker in the patrol car, and in his opinion the projectile found by Officer Tucker in the automobile was fired from the Marlin rifle claimed by the defendant.

When the foregoing evidence is considered in the light most favorable to the State, we think it is sufficient to require the submission of the case to the jury on the count in the bill of indictment charging the defendant with assaulting a police officer with a firearm. The defendant's motion for judgment as of nonsuit was properly denied.

The defendant contends the court committed prejudicial error in its instructions to the jury on the count charging an assault with a firearm on a police officer. When the entire charge of the court is considered contextually, we find it correct and free from prejudicial error.

[2] Defendant contends he was denied his constitutional right to a speedy trial. With respect to this contention, the record, in pertinent part, is as follows:

"MR. SMITH: If your Honor please, the warrant in this action was issued on December 12, 1969, I believe. The defendant was apprehended in February of 1970, and he was held for fifty-three days in jail before being released on bond. He was under a very high bond, a bond that he couldn't make. And then the bond was lowered to a bond that he could make.

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He was from Washington, D. C., and he has come from Washington for each of these trials. They were scheduled February 23, 1970; December 9, 1970; February 24, 1971; April 15, 1971, and then again at the present session.

In each instance the State has requested a continuance. Never has the defendant requested a continuance. . . . And the continuances of this prosecution have been a bar and impediment to him in his normal life. And I think . . . that the prosecution ought to be dismissed on the grounds of the Sixth Amendment, a right to a speedy trial.

\* \* \*

MR. ALBRIGHT: . . . .

The first time it was continued his client was in jail. And you, Mr. Smith, were advised of our intention to submit indictments for three other defendants, who are now jointly indicted. And we didn't oppose bond reduction. That was March, 1970, Term, other defendants were indicted.

On at least two other occasions, I have had an F.B.I. agent physically incapacitated. . . .

\* \* \*

MR. SMITH: . . . .

On the other hand, I agreed with you that I would permit Mr. Poppleton's report in, if necessary.

MR. ALBRIGHT: On the ballistics information, I would prefer to have his live testimony.

. . . But I know in November and April the reasons for the State not calling the case was the physical handicap of Mr. Poppleton."

In *State v. Ball*, 277 N.C. 714, 178 S.E. 2d 377 (1971), Justice Moore, speaking for the North Carolina Supreme Court, said:

" . . . The circumstances of each particular case determines whether a speedy trial has been afforded. Undue delay cannot be defined in terms of days, months, or even years. The length of the delay, the cause of the delay, prejudice to the defendant, and waiver by the defendant are interrelated factors to be considered in determining whether a trial has been unduly delayed. The burden is on the accused who

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asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution."

In the present case, the defendant has failed to show that the delay in bringing him to trial was due to the neglect or willfulness of the State, or that he was in any way prejudiced by the delay. The record reveals legitimate and reasonable excuses for any delay in bringing this defendant to trial. The defendant's motion to dismiss was properly denied. See *State v. Cavallaro*, 274 N.C. 480, 164 S.E. 2d 168 (1968); *State v. Neas*, 278 N.C. 506, 180 S.E. 2d 12 (1971); *State v. Wrenn*, 12 N.C. App. 146, 182 S.E. 2d 600 (1971).

We have carefully reviewed all of the defendant's assignments of error relating to the charge of assaulting an officer with a firearm, and we conclude that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

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STATE OF NORTH CAROLINA v. RONALD DARRELL BROWN

No. 7122SC716

(Filed 29 December 1971)

**1. Criminal Law § 15; Jury § 2— change of venue — special venire — pretrial publicity**

The trial court in this prosecution for attempted armed robbery did not abuse its discretion in the denial of defendant's motion for a change of venue or a special venire made on the ground of pretrial publicity of the crime and of the escape from jail and recapture of defendant's alleged companions in the crime.

**2. Criminal Law §§ 43, 66— mug shots — admissibility**

Two "mug shot" photographs of defendant were properly admitted for illustrative purposes, tape having been placed over the lower portions of the photographs to cover the criminal identification numbers.

**3. Robbery § 4— attempted armed robbery — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of attempted armed robbery where it tended to show that three persons attempted to rob a grocery store,

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that a fourth person drove the getaway car, and that defendant and three companions discussed the attempted robbery in the presence of a State's witness and defendant stated that he was the driver and had gotten out of the car with a shotgun.

4. Criminal Law § 132— motion to set verdict aside

The ruling of the trial judge on a motion to set aside the verdict as being contrary to the weight of the evidence is not reviewable on appeal absent a manifest abuse of discretion.

APPEAL by defendant from *Beal, Special Judge*, 21 June 1971 Criminal Special Session of DAVIDSON Superior Court.

Defendant was tried on a bill of indictment charging him with the attempted armed robbery of Abernathy's Grocery on 11 February 1971. Prior to trial, he moved for change of venue or special venire which motion was denied.

Evidence for the State tended to show: Terry Lowery and Bradley Brogden were working in Abernathy's Grocery on the night of 11 February 1971. Around 9:00 p.m. two men, Jimmy Maddox and Albert Gerald Brown, entered the store. Someone ordered Lowery to empty the cash register and as Lowery walked to the cash register he was shot. Lowery then grabbed a pistol under the cash register and fired at Maddox. Buck Phillips was also seen in the store with a gun in his hand. Two men jumped in a car driven by an individual with unusually long hair. Sarah Carroll testified that Maddox, Albert Brown and Phillips left defendant's mother's trailer with defendant and returned an hour later talking about having held up the store and the fact that someone had been shot; that defendant stated that he was the driver and had gotten out of the car with a shotgun. There was also testimony that defendant had long brown hair on the night of the attempted robbery and was seen with a shotgun. On 12 February 1971 four men were arrested at Forest Hills Trailer Park at a trailer belonging to a Mrs. Lovelan Shaw. At the time of the arrest Mrs. Carroll was in the trailer. Corroborative evidence of her testimony was given by Lieutenant Kimbrell of the Lexington Police Department.

Evidence for the defendant tended to show: Jimmy Maddox, William Phillips and Albert Brown picked up defendant, then picked up Sarah Carroll and went to defendant's mother's house. They left there, then took defendant to his wife's house where they left him at about 9:15 p.m. The others went to Buck Phillips' house and played cards until 10:20 p.m. when they re-

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turned to defendant's house and left there with him at 10:55 p.m. returning to defendant's mother's house. Defendant's wife gave similar testimony. There was testimony that Sarah Carroll stated to Josephine Ensley that defendant had nothing to do with the attempted robbery and that Sarah Carroll had told three different stories about the matter.

The jury found defendant guilty of attempted armed robbery as charged and judgment was entered sentencing him to not less than 12 years nor more than 15 years in the State Prison. From said judgment, defendant appealed.

*Attorney General Robert Morgan by Staff Attorney Donald A. Davis for the State.*

*James Eugene Snyder, Jr., for defendant appellant.*

BRITT, Judge.

[1] Defendant's first assignment of error is to the denial of his motion for a change of venue or a special venire, on the grounds that the residents of the area were saturated with publicity about the attempted robbery and this awareness was fanned by their fear when there was an escape and a recapture of two escapees in prominent Lexington homes. The assignment of error is without merit.

"A motion for change of venue or for special venire, may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable here unless gross abuse is shown." *State v. Allen*, 222 N.C. 145, 147, 22 S.E. 2d 233, 234 (1942). See *State v. Scales*, 242 N.C. 400, 87 S.E. 2d 916 (1955). There is nothing in the record indicating that any juror was unable to render a fair and impartial verdict and in the absence of such showing, no abuse of discretion is shown. *State v. Brown*, 271 N.C. 250, 156 S.E. 2d 272 (1967).

[2] Defendant next assigns as error the court permitting the jury to examine two police photographs of defendant in the traditional photographic position of a criminal, there being one of the profile position and one of the full face. There was tape over the lower portion of the photographs to cover the criminal identification numbers. Defendant contends this placed his character before the jury when he at no time took the stand in

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his own defense. The photographs were offered for the purpose of illustrating or corroborating the testimony of Mrs. Carroll. In *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970) the court directly answered the question controlling this issue:

Defendant contends, however, that introduction of the 'mug shot' photograph of him tended to apprise the jury of the fact that he had been in trouble before, reflected unfavorably upon his character and suggested that he had been convicted of other crimes. Upon the facts before us defendant's contention is unsound and cannot be sustained. Before the jury was allowed to see the photograph in question, the portions which might have been prejudicial to him, i.e., the name of the police department and the date, were covered by an evidence tag. This left only an ordinary photograph, which was offered and admitted for illustrative purposes bearing upon identification of defendant. The photograph was relevant and material on the question of identity and could not have been prejudicial in the sense suggested by defendant. There was nothing on it to connect defendant with previous criminal offenses . . . .

We therefore hold that the photograph, with inscription and date deleted, was properly admitted for illustrative purposes on the question of identity.

Defendant's next assignment of error concerns the admission into evidence of a shotgun, allegedly found in the mobile home at which defendant was apprehended. The search was without a warrant or permission of the owner. A careful look at the record reveals that the shotgun was never admitted into evidence, but only marked as State's Exhibit #3; when presented to Mrs. Carroll for identification, she could not identify the shotgun, thus it was never admitted into evidence. Since the gun was not admitted into evidence, we do not reach the question of defendant's standing to object to the search.

**[3]** Defendant contends that it was error to deny his motions for nonsuit interposed at the end of the State's evidence and renewed at the close of all the evidence. It is well settled that on a motion for nonsuit, the evidence must be viewed in the light most favorable to the State, and the State is entitled to every reasonable intendment thereon and every reasonable inference therefrom. *State v. Vincent*, 278 N.C. 63, 178 S.E. 2d

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608 (1971). Although the State's case rested heavily on the testimony of one witness, this presented a question for the jury which was properly submitted to them.

[4] Defendant contends the court erred in denying his motion to set aside the verdict as being contrary to the greater weight of the evidence. The ruling of the trial judge on this motion is not reviewable on appeal in the absence of a manifest abuse of discretion. *State v. Massey*, 273 N.C. 721, 161 S.E. 2d 103 (1968). There is no showing of abuse of discretion.

Defendant submitted other assignments of error which have been carefully reviewed but found to have no merit. He received a fair trial, free from prejudicial error.

No error.

Judges BROCK and VAUGHN concur.

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STATE OF NORTH CAROLINA v. GORDON BROADNAX

No. 7117SC762

(Filed 29 December 1971)

**1. Criminal Law § 166— abandonment of assignment of error**

An assignment of error not brought forward and argued in the brief is deemed abandoned. Court of Appeals Rule No. 28.

**2. Assault and Battery § 15— felonious assault — self-defense**

In a prosecution for felonious assault, the trial court erred in failing to instruct the jury on self-defense where defendant's evidence tended to show that the assault victim went to defendant's home at 2:00 a.m. and refused to answer when asked what he wanted but glared menacingly at defendant, that when the victim refused to leave defendant got his shotgun and ordered him to leave, that the victim put his hand in his pocket and began advancing on defendant, that defendant shot him, and that the victim had been involved in an argument with a guest of defendant's earlier in the evening and had displayed a "hawk bill" knife.

APPEAL by defendant from *Seay, Judge*, 21 June 1971 Criminal Session, Superior Court of ROCKINGHAM County.

Defendant was charged with assault with a deadly weapon with felonious intent to kill, inflicting serious injuries, not

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resulting in death. He entered a plea of not guilty. The jury returned a verdict of guilty of assault with a deadly weapon (a firearm) inflicting serious bodily injury. From judgment entered on the verdict, defendant appealed.

*Attorney General Morgan, by Assistant Attorney General Hafer, for the State.*

*Gwyn, Gwyn and Morgan, by Melzer A. Morgan, Jr., for defendant appellant.*

MORRIS, Judge.

[1] Defendant's first assignment of error is directed to the sufficiency of the evidence to be submitted to the jury. No motions for dismissal as of nonsuit were made at the trial, but by this assignment defendant requests that the sufficiency of the evidence be considered on appeal under the provisions of G.S. 15-173.1. He does not bring forward this assignment of error and argue it in his brief. It is, therefore, deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[2] By the next assignment of error, defendant contends that the trial tribunal committed prejudicial error in failing to instruct the jury on self-defense. We agree.

The evidence for the State tends to show that the prosecuting witness, Samuel P. Roberts (Roberts), went to defendant's home to purchase a drink of whiskey about 10:30 p.m. He and two friends were on their way to a dance. They stayed at defendant's home about 30 minutes, left, and went on to Eden where the dance was supposed to be. When they arrived, the place was closed, and nothing was going on. They "fooled around" a while and headed back toward Reidsville. They saw the lights were still on at defendant's house, and Roberts suggested that they stop so he could get another drink. He had had nothing to drink since the drink he purchased from defendant earlier in the evening. The time of the second visit was approximately 2:00 a.m. Roberts went in the house alone. Defendant and his wife were there and one Peter McGee who was lying on the couch. Roberts ordered another dollar drink and gave defendant a five dollar bill. Defendant contended he did not owe Roberts any change and an argument ensued. De-

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fendant went through a door, came back and stuck a single barrel shotgun through the door and shot Roberts in the left leg. Defendant then ran out from behind the door, called Roberts a dirty name, raised the gun over his head saying "I am going to finish killing you." Roberts grabbed the gun and shoved defendant in the stomach and hit him on the head. When he started to hit defendant again, defendant's wife hollered, so Roberts threw the gun down. Defendant then came up and hit Roberts in the head with a whiskey bottle. Roberts felt himself "giving out" so he left the house and went to the car. Roberts had no weapon of any sort that night.

Roberts' companion, Gaston, corroborated Roberts' testimony adding that he did not go in defendant's house with Roberts on the second visit but did go in after a short while to see what was detaining him. When he walked in, defendant and Roberts were arguing over some money. Defendant went through the kitchen to the living room and came around through another door "and I saw the door cracking open and I told Sammy to watch out, after about that time he shot him." Gaston testified that Roberts did not have anything in his hands.

The defendant and his wife testified. Their evidence tended to show the following: On the night in question defendant was having a fish fry. Shortly after 11:00 p.m. Roberts and his friends came by. The invited guests were eating fish and having a good time. Roberts was not invited. Defendant told him he could come in if he would act like other people. Roberts was not in the house five minutes before he wanted to pick a fight with a guest over two dollars he said the guest owed him. Defendant told Roberts that if the guest owed him two dollars, he, defendant, would give it to Roberts. Whereupon Roberts took out a "hawk bill" knife and the guest said he would leave rather than get in trouble. Whereupon the guest went to his car. Roberts followed him, the guest left. Defendant told Roberts to go away and "don't come back." Shortly after 2:00 a.m. Roberts returned. He and "the other boy" came in. When defendant asked what he wanted Roberts just stood there "looking at me like he was going through me." Defendant told him to get out. "He kept looking at me like he was going to do something to me and I kept raising my voice and telling him to get out of my house." Defendant did not sell him any liquor. Roberts

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did not leave and defendant went back to the bedroom and got the shotgun. He was standing about four feet from Roberts. He cocked the gun and told Roberts two or three times to get out. "He put his hands in his pocket like he was drawing to cut me or something and that is why I shot him. He made a move toward me, that is when I shot him. I did not try to kill him, but I wanted him to know that I would. After I shot him, he still would not get out and I did not have but the one shell in the gun and it was a good thing. So I said I will knock you out of the door if you don't get out and that is when we got to shuffling with it and he hit me on the head with it after he took it away from me . . . "

Defendant contends that the court should have charged the jury on self-defense. We think this assignment of error is a valid one.

The facts are not dissimilar to those in *State v. Lee*, 258 N.C. 44, 127 S.E. 2d 774 (1962). There the evidence for the State was that the prosecuting witness went in defendant's store to buy some ice cream. While a clerk was dipping up the ice cream, defendant, owner of the store, came up and struck the prosecuting witness on the head with a stick saying, "I told you to stay out of here." The defendant's evidence was that the prosecuting witness came in the store about midnight and wanted to buy some beer. Defendant told him it was after hours and he could not sell him beer. Defendant told him this at least twice but prosecuting witness replied "I am going to have some beer" and was coming around the counter. "He acted as if he was coming around the counter toward me when I hit him. . . . The reason I hit him is because I wouldn't sell him beer, and I thought he was coming on me, and I did it to protect myself." There the court held the evidence sufficient to require a charge on self-defense.

The evidence here is even stronger. Here defendant's evidence would permit a jury to find that after two o'clock in the morning, Roberts went to defendant's home; refused to answer when asked what he wanted but glared at defendant menacingly. When he refused to leave, defendant got his shotgun, cocked it and ordered Roberts out. Roberts refused to leave but put his hand in his pocket and began advancing on defendant. Earlier in the evening, Roberts had been involved in an argument with a guest of defendant's and had displayed a "hawk bill" knife.

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The evidence is sufficient to entitle defendant to have his plea of self-defense passed upon by the jury under proper instructions by the court.

Defendant's other assignments of error are also directed to the charge of the court. Since there must be a new trial, there is no need to discuss them.

New trial.

Judges CAMPBELL and PARKER concur.

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STATE OF NORTH CAROLINA v. ROBERT LEE JOHNSON

No. 7110SC722

(Filed 29 December 1971)

**1. Criminal Law § 34—evidence showing commission of another crime — competency to show intent**

In this prosecution for illegal possession of marijuana, evidence that a confidential informant for the police had purchased marijuana from defendant two weeks prior to the date of possession alleged in the indictment was competent to show defendant's intent and knowledge, notwithstanding the evidence tends to show defendant's commission of another crime.

**2. Criminal Law § 50; Narcotics § 3—police officers — opinion that substance is marijuana**

The trial court did not err in permitting a police officer to state his opinion that a substance purchased by a confidential informant from defendant was marijuana after the State established the qualification of the officer to give his opinion.

**3. Criminal Law § 51; Evidence § 48—ruling on qualification of expert**

In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show a specific finding on this matter, the finding being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness.

**4. Constitutional Law § 31—identity of confidential informant**

In a prosecution for illegal possession of heroin, the trial court did not err in refusing to allow defense counsel to question a police officer as to the identity of a confidential informant who gave the police information that defendant had marijuana in his residence.

APPEAL by defendant from *Brewer, Judge*, 31 May 1971 Session of Superior Court held in WAKE County.

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Defendant was charged in a bill of indictment with illegal possession of marijuana.

State's evidence tended to show the following. On 12 July 1970, based upon information supplied by an informer, a Raleigh police officer secured the issuance of a warrant to search defendant's residence for marijuana. As a consequence of the search, executed in defendant's presence on 12 July 1970, the officers found twenty grams of marijuana in a plastic bag concealed in a waste basket in the living room of defendant's residence.

Defendant's evidence tended to show the following. On 12 July 1970 defendant and his wife and children had been away from home all day. When they left, the doors to the house were left unlocked but when they returned the doors were locked. Immediately after their return home, the officers served the search warrant and conducted the search. Defendant and his wife testified that they had never had any marijuana in their house and they had never allowed anyone else to have it there. Defendant also testified that he had never sold marijuana to anyone at anytime.

The State in rebuttal offered evidence which tended to show that one of the Raleigh police officers working through a confidential informer had purchased a small bag of marijuana at defendant's house about two weeks prior to the search. It also tended to show that defendant was the person with whom the confidential informer was negotiating.

The jury returned a verdict of guilty and judgment of confinement for a period of not less than three nor more than five years was entered. Defendant appealed.

*Attorney General Morgan, by Special Counsel Moody, for the State.*

*Russell W. DeMent, Jr., for defendant.*

BROCK, Judge.

[1] Defendant assigns as error that the State was allowed to offer evidence of the transaction between defendant and the confidential informer two weeks before the search in question. He argues that this violates the rule against allowing evidence of one crime to prove the commission of another. He cites *State*

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*v. McClain*, 240 N.C. 171, 81 S.E. 2d 364, in support of his argument.

The evidence complained of by defendant was properly admitted under the exceptions to the general rule as pointed out in *State v. McClain, supra*. Defendant and his wife absolutely denied knowledge of the marijuana or that they had anything to do with it. Defendant also testified that he was not suggesting that a person who lived with him had anything to do with marijuana. Defendant and his wife testified that they never locked the doors to their house and were clearly seeking to leave the impression that some unknown person came to their house and secreted the marijuana while they were away. It was competent for the State to show by the challenged evidence the defendant's intent and guilty knowledge as well as his motives. See *State v. Colson*, 222 N.C. 28, 21 S.E. 2d 808; *State v. Hardy*, 209 N.C. 83, 182 S.E. 831. This assignment of error is overruled.

[2] Defendant assigns as error that Detective Watson was allowed to state that in his opinion the substance purchased by the confidential informant was marijuana. The trial judge sustained defendant's objection until the State established appropriate qualifications of the witness to give his opinion. This assignment of error is without merit. Detective Watson testified that he had studied the identification of various drugs, including marijuana; that he was familiar with the plant in its growing form; that in his work he had been observing marijuana for the last five or six years; that he was familiar with its appearance and its odor; and that during the last two or three years he had been engaged in work with marijuana on a weekly basis. Based upon this familiarity with, experience with, and knowledge of marijuana, the trial judge allowed Detective Watson to express his opinion that the substance purchased by the confidential informant was marijuana. The trial judge did not commit error in this respect.

"The competency of a witness to testify as an expert in the particular matter at issue is addressed primarily to the discretion of the trial court, and its determination is ordinarily conclusive unless there is no evidence to support the finding or unless there is an abuse of discretion." 3 Strong, N.C. Index 2d, Evidence, § 48, p. 677.

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[3] The trial judge in this case did not make an express finding that Detective Watson was an expert, but defendant did not state that his objection to the testimony was on the grounds that the witness was not an expert. In the absence of a request for a finding by the trial judge as to the qualification of the witness as an expert, it is not essential that the record show a specific finding. In the absence of such request, the finding by the trial judge is implicit in his ruling upon the admissibility of the evidence. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839.

[4] Defendant next assigns as error that the trial judge refused to allow defense counsel to question the police officer concerning the identity of the confidential informant.

" . . . A defendant is not necessarily entitled to elicit the name of an informer from the State's witnesses. (citation) The Government's privilege against disclosure of an informant's identity is based on the public policy of 'the furtherance and protection of the public interest in effective law enforcement'. (citation) However, the privilege must give way 'where the disclosure of the informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to fair determination of a cause. . . . ' (citation)" *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53.

Defendant relies upon *Roviaro v. U.S.*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957). In *Roviaro* the confidential informer had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether accused knowingly transported the drugs as charged. In the instant case the activities of the confidential informer were only collaterally connected with the offense for which defendant was on trial. There is no showing that the identity of the confidential informer would be relevant or helpful to defendant's defense against the charge upon which he was being tried. The only evidence concerning the informer was the testimony of Detective Watson relating what he (the officer) observed.

No error.

Judges BRITT and VAUGHN concur.

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## STATE OF NORTH CAROLINA v. JAMES GARLAND BROWN

No. 7110SC707

(Filed 29 December 1971)

**1. Criminal Law § 166—abandonment of assignments of error**

Assignments of error not brought forward and argued in the brief are deemed abandoned. Court of Appeals Rule 28.

**2. Automobiles § 125—drunken driving on public parking lot—warrant**

Warrant alleging that on a specified date defendant "did unlawfully and wilfully drive a vehicle on a public parking lot of this State while under the influence of intoxicating liquor. To wit: 1126 S. Saunders St., Raleigh," held sufficient to charge a violation of G.S. 20-139.

**3. Automobiles § 126; Criminal Law § 64—drunken driving on public parking lot—refusal to take breathalyzer test—inadmissibility**

Evidence of defendant's refusal to take a breathalyzer test was inadmissible in a June 1971 trial for an offense of driving on a public parking lot while under the influence of intoxicating liquor which occurred in October 1970, the statute allowing such testimony then being applicable only to offenses on the public highways. G.S. 20-139.1(f) prior to its amendment effective 1 October 1971.

APPEAL by defendant from *Hall, Judge*, 24 June 1971 Session of Superior Court, WAKE County.

Defendant was charged with driving under the influence on a public parking lot. He was convicted by a jury and appealed from the judgment entered on the verdict.

*Attorney General Morgan, by Associate Attorney General Price, for the State.*

*James F. Penny, Jr., for defendant appellant.*

MORRIS, Judge.

[1] The record contains 22 assignments of error. Nos. 2, 3, 4, 6, 14, 18, 19, 20, 21 and 22 are not brought forward and argued in appellant's brief. They are, therefore, deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[2] By his first assignment of error, defendant contends the trial tribunal erred in failing to sustain his motion to quash the warrant. The warrant charged that "on or about the 3 day

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of Oct. 1970, the defendant named above did unlawfully and wilfully drive a vehicle on a public parking lot of this State while under the influence of intoxicating liquor. To wit: 1126 S. Saunders St., Raleigh." The ground for defendant's motion is that the warrant fails to charge the defendant with a criminal offense in that it doesn't inform him of the violation with which he is charged. Defendant argues that G.S. 20-138 and G.S. 20-139 each creates and defines a separate criminal offense. With this position we agree. *State v. Davis*, 261 N.C. 655, 135 S.E. 2d 663 (1964). G.S. 20-138 makes the operation of a *vehicle upon the public highways* while under the influence of an intoxicating beverage a criminal offense. G.S. 20-139 makes the operation of a *motor vehicle on the grounds of a business* while under the influence of an intoxicating beverage a criminal offense. Here the charge was under G.S. 20-139, and the warrant used the word "vehicle" rather than "motor vehicle." Of course, it would be better to use the words "motor vehicle." Nevertheless, the warrant sufficiently describes the charge against defendant in a plain, intelligible, and explicit manner. It is sufficient to enable the court to proceed to judgment and thus bar another prosecution for the same offense. *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). We can perceive no way in which the phraseology used in the warrant could have been prejudicial to defendant. This assignment of error is overruled.

[3] The court allowed the arresting officer and another officer to testify, over objection, that defendant had refused to take the breathalyzer test and also allowed the solicitor to argue, over objection, that defendant's refusal and failure to take the test was within itself an indication of guilty knowledge. In so doing, the trial tribunal committed prejudicial error. The 1963 General Assembly enacted G.S. 20-16.2(b) which provided:

"If a person under arrest refuses to submit to a chemical test under the provisions of G.S. 20-16.2, evidence of refusal shall be admissible in any criminal action growing out of an alleged violation of driving a motor vehicle upon the public highways of this State or any area enumerated in G.S. 20-139 while under the influence of intoxicating liquor. Provided: That before evidence of refusal shall be admissible in evidence in any such criminal action the court, upon motion duly made in apt time by the defendant, shall make due inquiry in the absence of the jury as to the

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character of the alleged refusal and the circumstances under which the alleged refusal occurred; and both the State and the accused shall be entitled to offer evidence upon the question of whether or not the accused actually refused to submit to the chemical test provided in G.S. 20-139.1."

The 1969 General Assembly amended G.S. 20-16.2, G.S. 20-139.1 and G.S. 20-179. The result was that the provision quoted above became G.S. 20-139.1(f) and provided:

"If a person under arrest refuses to submit to a chemical test under the provisions of G.S. 20-16.2, evidence of refusal shall be admissible in any criminal action arising out of acts alleged to have been committed while the person was driving a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor."

Either by inadvertence or intent, the General Assembly removed the admissibility of evidence of refusal where the defendant was charged with driving on a public parking lot while under the influence of intoxicating liquor.

The 1971 General Assembly again amended the statute and remedied the deficiency. G.S. 20-139.1(f) now provides:

"If a person under arrest refuses to submit to a chemical test or tests under the provisions of G.S. 20-16.2, evidence of refusal shall be admissible in any criminal action arising out of acts alleged to have been committed while the person was driving or operating a vehicle while under the influence of intoxicating liquor."

The offense with which this defendant was charged occurred on 3 October 1970, and his trial took place in June 1971. Therefore, the 1969 statutory provision was effective, limiting admissibility of evidence of refusal to take the test to cases involving charge of driving a motor vehicle upon the *public highways* of this State while under the influence of intoxicating liquor. Under these circumstances, it was error for the trial tribunal to allow the testimony of the officers to be admitted, to allow the solicitor to make the refusal a subject of his argument to the jury, and for the trial tribunal to refer to defendant's refusal in his charge to the jury.

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In re Harper

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We do not discuss defendant's other argued assignments of error because they are not likely to occur upon a new trial.

New trial.

Judges CAMPBELL and PARKER concur.

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IN THE MATTER OF: MICHAEL HARPER, AGE 14

No. 713DC698

(Filed 29 December 1971)

**1. Infants § 10—juvenile delinquency hearing — admission of confession**

Juvenile's confession was properly admitted in a juvenile delinquency hearing absent an appropriate objection, and the confession sustains the findings of delinquency by the presiding judge.

**2. Infants § 10—commitment of juvenile delinquent**

Juvenile delinquent should be committed to the care of the "Board" of Juvenile Correction, not the "Department" of Juvenile Correction.

APPEAL by Michael Harper from *Wheeler, District Court Judge*, 2 July 1971 Session of District Court held in PITT County.

It was alleged in a petition that Michael Harper is a delinquent child as defined in G.S. 7A-278(2) by reason of his breaking or entering each of six premises and by reason of each of seven offenses of larceny.

The petition to invoke the jurisdiction of the court was filed by Lt. Dilda of the Farmville Police Department on 28 June 1971. On 28 June 1971 counsel was appointed to represent the alleged delinquent child, and a hearing was conducted on 2 July 1971.

An extensive evidentiary hearing was conducted to determine whether the juvenile had been properly advised of his constitutional rights. Upon this *voir dire* both the State and the juvenile offered evidence. At the conclusion of the *voir dire*, the presiding judge found "that the juvenile has been properly advised of his Constitutional rights." No objection or exception was made to this finding.

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In re Harper

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Other than the *voir dire* testimony, the only evidence offered at the hearing on the petition was the signed confession of the juvenile. The confession reads as follows:

"STATE'S EXHIBIT No. 1

On June 2, 1971 I did admit to Breaking and Entering into Joe Blount's Store on April 12, 1971 and steal merchandise and I further admit that I broke into the following places and steal an undetermine amount of merchandise within these places:

Broke Into:	Shack on Apr. 12, 1971
Machine in Walker Bldg	on May 17, 1971
Harris Place	on May 23, 1971
Ruby Whites	on May 28, 1971
Nat Norris	on May 30, 1971
James Ridley Barber Shop	on May 30, 1971

Signed: Michael Harper

Date: June 2, 1971

Witness: Police Officer—J. C. Bryant, Jr."

The presiding judge found that Michael Harper was a delinquent child in each of thirteen findings and that he committed a criminal offense (six offenses of breaking or entering and seven offenses of larceny). Based thereon, the judge ordered that Michael Harper be placed with the N. C. Department of Juvenile Correction for an indefinite period of time.

Michael Harper appealed.

*Attorney General Morgan, by Associate Attorney Haskell, for the State.*

*Everett & Cheatham, by James T. Cheatham, for the juvenile-appellant.*

BROCK, Judge.

[1] The lengthy inquiry and finding by the presiding judge that Michael Harper had been properly advised of his constitutional rights does not seem to have accomplished any purpose. Generally, the inquiry is whether after having been advised of his constitutional rights an accused freely, understandingly,

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and voluntarily made a statement or gave a confession. However, in this case there was no objection to the introduction of the confession into evidence. Absent an appropriate objection, the confession was properly admitted, and the confession sustains the findings of delinquency by the presiding judge.

[2] We note that the presiding judge ordered the *juvenile to be placed with* the N. C. Department of Juvenile Correction. Although the wording of the order is not fatal, trial judges would be well advised to follow the wording of the statute. In instances such as this, the correct order would be to *commit the child to the care of* the North Carolina Board of Juvenile Correction. G.S. 7A-286.

In our opinion Michael Harper had a fair hearing, free from prejudicial error.

No error.

Judges BRITT and VAUGHN concur.

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SECURITY MILLS OF ASHEVILLE, INC. v. WACHOVIA BANK AND TRUST COMPANY, N.A.

No. 7128DC673

(Filed 29 December 1971)

**Banks and Banking § 10; Venue § 2—action against national banking association — venue**

An action in this State against a national banking association need not be brought in the county where the banking association's main offices are located but may be prosecuted in the appropriate court in the county where the branch which transacted the business complained of is located. Title 12, USCA, Section 94.

APPEAL by defendant from Allen, *Chief District Judge*, 26 July 1971 Session of District Court held in BUNCOMBE County.

Plaintiff instituted this action in Buncombe County seeking to recover \$5,301.96 from defendant upon allegations that defendant improperly cashed and paid certain checks which were drawn to the order of plaintiff.

Defendant filed a motion for a change of venue to Forsyth County upon the grounds that (1) defendant is chartered under

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the laws of the United States as a National Banking Association, (2) that its charter issued by the Comptroller of the Currency designated that defendant is located in Winston-Salem, North Carolina, and (3) that Title 12, USCA, Section 94 requires that an action against a National Banking Association must be brought in a court in the county in which defendant is located.

Upon the hearing to remove to Forsyth County, defendant offered in evidence a copy of its charter issued by the Comptroller of the Currency authorizing it to do business as a National Banking Association and stating that it is located in Winston-Salem, North Carolina. Defendant also offered in evidence a copy of its Articles of Association which, *inter alia*, provides that its main offices shall be in Winston-Salem. No evidence was offered by the plaintiff.

The trial judge denied defendant's motion and defendant appealed.

*Hendon & Carson, by George Ward Hendon, for plaintiff.*

*Van Winkle, Buck, Wall, Starnes & Hyde, by Emerson D. Wall, for defendant.*

BROCK, Judge.

We treat the record and brief filed by defendant as a petition for certiorari and the same is allowed.

Defendant relies upon Title 12, USCA, Section 94, which reads as follows:

"Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Obviously, the statute was designed to prevent a bank from being required to carry its records and personnel to some point distant from its office. However, the statute must be construed in the light of current commercial practices of banking institutions in North Carolina. Under the present setting in North Carolina, banking institutions operate branch banks in various

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In re Custody of Mason

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counties throughout the State. A banking institution locates in each of the various counties where it opens and maintains a branch for conducting business. Therefore, we interpret Title 12, USCA, Section 94, to permit an action in North Carolina against a national banking association to be prosecuted in the appropriate court in the county where the branch which transacted the business complained of is located.

Although the question has not been raised, we note that the trial judge failed to make the crucial finding as to whether the branch of Wachovia Bank & Trust Company which transacted the business complained of is located in Buncombe County. Apparently, everyone assumed the existence of such a branch; but, although we may recognize in general that banks are maintained in all large towns and cities, courts may not judicially notice the existence of a particular banking institution. 29 Am. Jur. 2d, Evidence, § 85, p. 117.

The Order appealed from is vacated and the cause is remanded for a new hearing on defendant's motion to remove.

Order vacated.

Cause remanded.

Judges BRITT and VAUGHN concur.

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IN THE MATTER OF THE CUSTODY OF LESLIE CAROL MASON

No. 7127DC731

(Filed 29 December 1971)

**1. Divorce and Alimony § 24—custody of minors—discretion of trial court**

In determining child custody wide discretion is necessarily vested in the trial judge, who has the opportunity to see the parties and hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.

**2. Divorce and Alimony § 18—denial of alimony pendente lite—findings of fact**

The trial court was not required to make negative findings of fact justifying his denial of an award of alimony *pendente lite* to the wife, the burden having been on the wife to establish her right to such alimony.

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In re Custody of Mason

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APPEAL by respondent (mother) from *Bulwinkle, District Judge*, 30 July 1971 Session of District Court held in GASTON County.

Billy Max Mason, the petitioner (father), filed a petition in the District Court praying that he be awarded custody of Leslie Carol Mason. Carolyn Sue Arnold Mason, the respondent (mother), filed answer in which she prayed for alimony without divorce, for alimony *pendente lite*, for custody of and support for Leslie Carol Mason, and for attorney fees.

The evidence was not included in the record on appeal. Appellant, the respondent (mother), does not contend that the findings of fact by the trial judge are not supported by the evidence, but only that the facts found do not support the conclusions of law.

The admissions in the pleadings establish that petitioner (father) and respondent (mother) are both residents of Gaston County; that petitioner and respondent were married to each other on 13 February 1967; that Leslie Carol Mason was born of the marriage; and that petitioner and respondent separated on 14 May 1971.

Upon respondent's demand in her answer for alimony *pendente lite* and custody of the child, notice was given to petitioner and hearing was held pursuant thereto.

The trial judge made conclusions of law as follows:

"That both petitioner and respondent are fit and proper persons to have the custody of the child of the parties;

"That the respondent is not a dependent spouse within the meaning of the North Carolina General Statutes;

"That the best interest and welfare of Leslie Carol Mason would be served if she is placed in the custody of the petitioner;

"That the respondent is not entitled to alimony or child support;"

An Order was thereafter entered awarding primary custody of Leslie Carol Mason to the petitioner (father). Respondent (mother) appealed.

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In re Custody of Mason

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*Childers & Fowler, by Henry T. Fowler, Jr., for petitioner (father).*

*Joseph B. Roberts III for respondent (mother).*

BROCK, Judge.

[1] In determining child custody wide discretion is necessarily vested in the trial judge, who has the opportunity to see the parties and hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. *In re Custody of Pitts*, 2 N.C. App. 211, 162 S.E. 2d 524. It is perfectly clear from the findings of the trial judge why he did not award custody of the child to respondent (mother); therefore, his award of custody to petitioner (father) should not be upset on this appeal. The welfare of the child is always open to inquiry by the court, and upon showing of a change of circumstances the order of custody may be modified. G.S. 50-13.7(a).

[2] Respondent (mother) argues that the trial judge failed to find facts which justify his denial of an award of alimony *pendente lite*. The trial judge is not required to make negative findings. Upon the application of respondent (mother) for alimony *pendente lite*, the burden was upon her to establish (1) that she is entitled to relief in her action for alimony without divorce, and (2) that she does not have sufficient means whereon to subsist during the prosecution of her claim or to defray the necessary expenses thereof. G.S. 50-16.3. Respondent (mother) still has an opportunity to bring her action to trial on the merits.

No error.

Judges BRITT and VAUGHN concur.

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State v. Fountain

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STATE OF NORTH CAROLINA v. WILLIAM J. FOUNTAIN, JR.

No. 714SC650

(Filed 29 December 1971)

**Criminal Law § 160—remand for correction of minutes**

Criminal action is remanded to the superior court for correction of patent errors appearing on the face of the official minutes where it appears that the wrong case number was affixed to the records of the superior court insofar as they show the plea, verdict, judgment and commitment, the record on appeal showing that the indictment, evidence and charge relate to a case with a different number.

APPEAL by defendant from *James, Judge*, 12 April 1971 Session of Superior Court held in ONSLOW County.

*Attorney General Robert Morgan by Assistant Attorney General Russell G. Walker, Jr., for the State.*

*Edward G. Bailey for defendant appellant.*

PARKER, Judge.

Decision of the questions presented by defendant's assignments of error and discussed in his brief must be deferred until the patent error appearing on the face of the record has been corrected by appropriate proceedings.

The record before us indicates that defendant was charged in Onslow County in three separate criminal cases, which on the records of that Court were assigned numbers 71Cr1450, 71Cr1451, and 71Cr1452 respectively. In each case defendant was charged with having committed the offense of armed robbery. It appears that each case arose out of a separate and distinct occurrence, the locale and victim in each case being different. The three cases were consolidated for trial, and upon such trial the jury was unable to agree and a mistrial resulted. Defendant was next brought to trial in only one case, No. 71Cr1452, and it is the trial of that case which gives rise to the present appeal.

The record before us contains the indictment in case No. 71Cr1452, and all of the evidence, both of the State and of the defendant, as well as the court's charge to the jury, relate to the offense charged in case No. 71Cr1452. However, the record of defendant's plea of not guilty, the verdict of the jury finding him guilty, and the judgment imposing prison sentence and com-

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State v. Fountain

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mitting him to prison, as shown in the record on appeal now before us, indicates that these were all entered in case No. 71Cr1450, an entirely separate and unrelated case. It further appears that defendant has not yet been retried in case No. 71Cr1450, and it would appear that the wrong case number was affixed to the records of the Superior Court insofar as they show the plea, verdict, judgment and commitment of this defendant. Whether this occurred as a result of clerical error or from other cause, the minutes and records of the Superior Court should be corrected to speak the truth as to the case in which defendant actually entered his plea, verdict was returned, and sentence imposed.

"The corrections of the official minutes of the superior court must be made in the superior court." *State v. Accor* and *State v. Moore*, 276 N.C. 567, 173 S.E. 2d 775. As in that case, the following from the opinion of Higgins, J., in *State v. Old*, 271 N.C. 341, 344, 156 S.E. 2d 756, 758, is applicable:

"[I]t becomes the duty of this Court, under its supervisory power, to remand the action to the Superior Court with directions that notice be given to counsel and parties, and after hearing, to certify any corrections necessary to make the record conform to the facts. In a criminal case, the solicitor should be given notice as well as defense counsel, and the defendant should be before the Court. It is the duty of the Superior Court to correct its own records in the manner pointed out by this Court in *State v. Cannon*, *supra*, (244 N.C. 399, 94 S.E. 2d 339) and *State v. Stubbs*, 265 N.C. 420, 144 S.E. 2d 262."

The action is remanded to the Superior Court for correction of the records of that Court. As soon as made, the correction shall be certified to this Court and attached to and made a part of the record on appeal in this case.

Remanded for correction of Superior Court records.

Judges CAMPBELL and MORRIS concur.

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State v. Holt

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STATE OF NORTH CAROLINA v. CHARLES LLOYD HOLT

No. 7117SC663

(Filed 29 December 1971)

**Criminal Law § 168—construction of charge as a whole**

A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct.

APPEAL from *Martin, Special Judge, (Robert M.)*, 5 April 1971 Session ROCKINGHAM Superior Court.

The defendant was tried on a two-count bill of indictment charging him with felonious breaking and entering and with felonious larceny of a quantity of rifles, pistols and shotguns. The defendant entered a plea of not guilty to the charges. He was found guilty by the jury and a prison sentence was imposed. The defendant appealed, assigning errors to the charge of the trial judge to the jury.

*Attorney General Robert Morgan by Assistant Attorney General William F. Briley for the State.*

*Leigh Rodenbough for defendant appellant.*

CAMPBELL, Judge.

The evidence on behalf of the State tends to show that defendant and Franklin Monroe Suits on Saturday afternoon, 7 March 1970, went to Reidsville, North Carolina, and on one of the highways just outside of Reidsville went into a sporting goods store operated by Leroy Pegram. They went in for the purpose of looking over the store and its contents. While they were in the store, Pegram, the owner, waited upon them. They were in the store only a few minutes and then later that night, after the store had been closed, they returned and removed a ventilator fan from the rear of the store building, and in that way obtained access to the inside. They took between \$5,000 and \$8,000 worth of rifles, shotguns and pistols. They then went to the State of Georgia where the defendant lived and proceeded to sell the loot. Some two weeks later Suits was incarcerated in the Rockingham County Jail on another charge of breaking and entering. Suits sent word to the Sheriff that he desired to talk and thereafter made a complete and voluntary disclosure as to

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State v. Killian

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this particular involvement with the defendant. This disclosure by Suits resulted in the charges against the defendant and his subsequent trial. At the trial Suits testified against the defendant, and it was his testimony, together with some other corroborating evidence, which constituted the evidence for the State. The defendant offered no evidence.

All of the assignments of error are directed to the charge of the trial court to the jury.

A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge, as a whole, is correct. *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971). In the instant case the charge as a whole presents the law fairly and clearly to the jury. We have considered each assignment of error, and the charge was full, fair and in no way prejudicial.

We find

No error.

Judges MORRIS and PARKER concur.

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STATE OF NORTH CAROLINA v. LEROY KILLIAN

No. 7126SC732

(Filed 29 December 1971)

**Burglary and Unlawful Breakings § 5; Larceny § 7—sufficiency of evidence**

The State's evidence, including fingerprint evidence, was sufficient to be submitted to the jury in a prosecution for breaking and entering and larceny.

APPEAL by defendant from *McLean, Judge*, 26 July 1971  
"B" Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the felonies of breaking and entering with intent to steal, and larceny. The defendant pleaded not guilty.

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State v. Killian

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The evidence for the State tended to show that Mrs. Amelia Grant left her home at 818 Fontana Street in Charlotte closed and locked, with one light burning in the living room, on the night of 6 March 1971 between the hours of 6:00 and 7:00 p.m. When she returned home between 11:00 and 12:00 p.m. that same evening, all of the lights were burning, the front and back doors were open, and a hole had been made in the front picture window. An electric can opener, a record player and other items were missing from her home when she returned.

The defendant, Leroy Killian, had never visited in the home of Mrs. Grant prior to 6 March 1971 and did not have permission on 6 March 1971 to be present in her home. When the investigating officer arrived at the Grant home about 12:30 on the night in question, a partial print of the defendant's left palm was found on the outside and to the left of the broken window. There was also a left thumbprint and the fingerprint of the left middle finger of the defendant taken from a manicure box located inside Mrs. Grant's home.

The jury returned a verdict of guilty as charged of the felony of breaking and entering with intent to steal and not guilty of the felony of larceny.

*Attorney General Morgan and Associate Attorney General Witcover for the State.*

*James J. Caldwell for defendant appellant.*

MALLARD, Chief Judge.

The defendant assigned as error the failure of the trial judge to allow his motion for judgment as of nonsuit and to set aside the verdict. The fingerprint evidence, together with the evidence that the house had been broken into and that some of its contents were missing, and the other circumstances, was sufficient evidence to require submission of this case to the jury. See *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969), and the cases therein cited.

The defendant also assigns as error certain portions of the charge and contends that the trial judge committed error in that he did not instruct the jury properly as to the presumption of innocence, expressed an opinion, did not instruct on circumstantial evidence and failed to charge on a lesser included offense.

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Cooke v. Motor Lines

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We hold that the charge presented the law fairly and clearly to the jury, and that the trial judge did not express an opinion.

The defendant has had a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and GRAHAM concur.

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WALTER H. COOKE, EMPLOYEE v. THURSTON MOTOR LINES, INC.,  
EMPLOYER, AETNA CASUALTY & SURETY CO., CARRIER

No. 718IC739

(Filed 29 December 1971)

**Master and Servant § 93—denial of motion to take additional evidence and for rehearing**

In this workmen's compensation proceeding, the Industrial Commission properly denied plaintiff's motion to take additional evidence on appeal and motion for a rehearing on all issues, where plaintiff's claim was denied by the hearing commissioner on the ground that plaintiff did not sustain an injury by accident arising out of and in the course of his employment, additional medical testimony plaintiff proposes to offer, which he did not have at the time of the hearing, has no bearing on how the accident occurred, and additional testimony plaintiff proposes to give is only more elaborative than his testimony at the original hearing.

APPEAL by plaintiff from an Opinion and Award by the North Carolina Industrial Commission, filed 18 May 1971, denying compensation.

Plaintiff filed claims for two alleged injuries to his back, one injury on 15 October 1969 and another on 18 January 1970. On 26 March 1970, a Notice of Hearing was issued to all parties advising of a hearing in Wayne County "to determine all matters involved." On 1 December 1970, Deputy Commissioner Delbridge filed his opinion and award denying compensation. Plaintiff appealed to the Full Commission, and also filed a motion to take additional evidence on appeal and a motion for a rehearing on all issues. The Commission denied plaintiff's two motions and, with minor amendments, affirmed the opinion and award of the Deputy Commissioner. Plaintiff appealed to this Court.

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Cooke v. Motor Lines

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*Crisp, Twiggs & Bolch, by Grover C. McCain, Jr., for plaintiff.*

*Freeman & Edwards, by James A. Vinson III, for defendants.*

BROCK, Judge.

Plaintiff argues five questions for our consideration. The first three are each related to the refusal of the Commission to allow the plaintiff to offer additional evidence either on appeal or by ordering a rehearing.

When plaintiff's evidence was taken by the Deputy Commissioner, plaintiff was at liberty to offer all competent evidence in his possession in support of his claim for compensation for either or both alleged injuries. Plaintiff's claim was denied because of a finding by the Deputy Commissioner that plaintiff did not sustain an injury by accident arising out of and in the course of his employment. Plaintiff does not propose to offer newly discovered evidence upon the question of how the injury occurred. He only proposes testimony by the claimant which is different, or more elaborative, than his testimony as originally given. Plaintiff's proposal to offer additional medical testimony and opinion, which he did not have at the time of the hearing, would have no bearing upon the crucial question of how the accident occurred. In our opinion, the Commission was correct in denying an additional evidentiary hearing, whether on appeal or by rehearing before the Deputy Commissioner.

Plaintiff's fourth and fifth arguments are addressed to the contents of the Opinion and Award filed by the Full Commission. They present no new or unusual questions and in our opinion are without merit.

Plaintiff had a full and fair hearing. He is not entitled to relitigate merely because the facts have been found against him.

No error.

Judges BRITT and VAUGHN concur.

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Bailey v. Hayes

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MARIE D. BAILEY, MINOR, BY HER GUARDIAN AD LITEM, HASSELL H. BAILEY v. KENNETH REID HAYES, DECEASED, BY GERALD W. HAYES, JR., ADMINISTRATOR

No. 713SC612

(Filed 29 December 1971)

**1. Trial § 33—recapitulation of plaintiff's evidence**

The trial court did not err in its recapitulation of plaintiff's evidence.

**2. Damages § 16—instructions**

The trial court did not err in its instructions upon the rules for the assessment of damages for personal injuries.

APPEAL by defendant from *May, Judge*, 24 May 1971 Session of Superior Court held in PITT County.

Plaintiff instituted this action to recover damages for personal injuries sustained by her on 22 November 1968. Her evidence tended to show that she was a passenger in defendant's vehicle at the time it collided with another vehicle at the intersection of Fourteenth Street and Highway 264 in Greenville, North Carolina. Her evidence further tended to show that she was thrown from defendant's vehicle and suffered numerous second and third degree abrasions; that she was hospitalized for a period of ten days; that she was thereafter treated as an out patient; that she had some plastic surgery performed on her lip; and that she has permanent scarring on her knee and feet.

Defendant stipulated that the negligence issue should be answered for the plaintiff and against the defendant. The jury answered the damage issue in the sum of \$18,000.00 and judgment was entered that plaintiff recover from defendant the sum of \$18,000.00 and the costs of the action. Defendant appealed.

*James, Hite & Cavendish, by M. E. Cavendish, for plaintiff.*

*Gaylord & Singleton, by L. W. Gaylord, Jr., and E. Burt Aycock, Jr., for defendant.*

BROCK, Judge.

[1] Defendant's first seven assignments of error are directed to seven different portions of the judge's charge to the jury

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State v. Pigg

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wherein he was recapitulating plaintiff's evidence. The evidence was not objected to and was properly admitted. The judge's recapitulations are accurate. These assignments of error are feckless.

[2] Defendant's assignments of error numbers 8, 9, and 10 are directed to the judge's charge wherein he was explaining the rules respecting the assessment of damages for personal injury. The explanations given by the judge are correct. These assignments of error are without merit.

We have considered defendant's remaining assignments of error and contentions and find them to be without merit. No prejudicial error has been shown.

No error.

Judges BRITT and VAUGHN concur.

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STATE OF NORTH CAROLINA v. EDDIE MICHAEL PIGG

No. 7126SC766

(Filed 29 December 1971)

1. Criminal Law § 145.1—probation — act of grace

Probation or suspension of sentence is not a right granted either by the U. S. Constitution or the N. C. Constitution, but is an act of grace to one convicted of a crime.

2. Criminal Law § 138—sentencing — recommendation of probation officer

Probation officer who had conducted a pre-sentence investigation in accordance with G.S. 15-198 was properly allowed to give his recommendation that defendant not be placed on probation.

APPEAL by defendant from *Martin, Harry C., Judge*, 27 September 1971 Criminal Session of MECKLENBURG Superior Court.

Defendant, Eddie Michael Pigg, was charged under separate bills of indictment with possession of more than one gram of marijuana, and with felonious breaking and entering and larceny. Defendant entered pleas of nolo contendere to all counts, was sentenced to 6-8 years in prison, and appealed from the entry of the judgment.

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State v. Pigg

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*Attorney General Morgan, by Associate Attorney Poole, for the State.*

*Plumides and Plumides, by John C. Plumides, for defendant appellant.*

MORRIS, Judge.

It is clear from the transcripts of plea and adjudications contained in the record that defendant freely, understandingly, and voluntarily entered his pleas without undue influence, compulsion, duress, or promise of leniency.

[1, 2] Defendant's sole assignment of error excepts to the opinion, given by the probation officer prior to sentencing, recommending that defendant not be placed on probation. In accordance with G.S. 15-198 a full investigation was made by a probation officer concerning defendant's criminal record, moral character, standing in the community, habits, occupation, social life, responsibilities, education, mental and physical health, the specific charge against him, and other matters pertinent to a proper judgment. See *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962). In his testimony before the court, the probation officer concluded that "in view of the previous circumstances I would have no alternative to recommend that he would be rather a poor risk for probation." The defendant was present in the courtroom, was represented by counsel, and was offered an opportunity to cross-examine the probation officer but declined. Presumably based upon the probation officer's pre-sentence report, the court imposed an active sentence. Probation or suspension of sentence is not a right granted either by the Constitution of the United States or of the Constitution of this State, but is an act of grace to one convicted of a crime. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967). "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope, supra*, at p. 335. We conclude that defendant was afforded every opportunity to rebut the probation officer's testimony and to introduce any relevant facts in mitigation. Defendant has not met the burden of proving the denial

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of some substantial right, and the sentencing procedure was free from error.

No error.

Judges CAMPBELL and PARKER concur.

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SAM HICKS AND WIFE, FLORENCE HICKS v. SANFORD HICKS, EXECUTOR OF THE WILL OF RHODA HALL, AND SANFORD HICKS AND WIFE, NORMA HICKS, DEVISEES UNDER THE WILL OF RHODA HALL, DECEASED

No. 7125SC527

(Filed 29 December 1971)

1. Frauds, Statute of § 7; Wills § 2—oral contract to devise

An oral contract to devise to plaintiff a portion of a farm in compensation for services rendered is within the statute of frauds and is unenforceable. G.S. 22-2.

2. Executors and Administrators § 7; Frauds, Statutes of § 7; Wills § 2—revoked will as evidence of contract to devise

Joint will executed by a husband and wife in which certain real property was devised to plaintiffs, which will the wife subsequently revoked by executing a new will, is not competent evidence of a contract by the devisors to devise their property, or a portion thereof, to plaintiffs in compensation for services rendered.

3. Executors and Administrators § 24; Quasi Contracts § 2—services rendered to decedent—failure to show special contract—recovery on quantum meruit

Failure of plaintiffs to present competent evidence to show a special contract to devise property in consideration of personal services does not preclude plaintiffs from having their case submitted to the jury if their evidence is sufficient to support a recovery based on *quantum meruit*.

4. Executors and Administrators § 25; Quasi Contracts § 2—action for personal services rendered decedent—statute of limitations

Plaintiffs' claim based on *quantum meruit* for services rendered decedents was barred by the three-year statute of limitations, G.S. 1-52(1), where the action was commenced in 1969 more than three years after the death of both decedents, plaintiffs' evidence shows that they performed none of the services for which they seek compensation after 1955, and plaintiffs' evidence failed to show any special agreement with respect to compensation.

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APPEAL by plaintiffs from *Friday, Judge*, January 1971 Session of Superior Court held in CALDWELL County.

Plaintiffs seek recovery for services allegedly rendered L. N. Hall and his wife Rhoda Hall from approximately 1925 until shortly after the death of L. N. Hall in 1953. They allege the following:

Feme plaintiff is the adopted daughter of L. N. Hall and wife Rhoda Hall. Shortly after plaintiffs were married in 1925, the Halls offered to employ them for work on the Halls' farm and in their orchard, store and home. Board, house rent and clothes were to be supplied, and the Halls promised "to leave all of the property owned by either or both of the Halls at their death, to the plaintiffs in lieu of wages." Plaintiffs accepted the offer and performed services until ordered by the executor of the estate of L. N. Hall to discontinue. Rhoda Hall died 12 January 1965 and left all of her property to defendants Sanford Hicks and his wife, Norma Hicks. Plaintiffs have received no compensation for the services they performed for the Halls pursuant to the agreement alleged.

Plaintiffs presented evidence tending to show that they worked for the Halls from 1925 until 1955 and that they received no compensation other than a share of the crops produced on the Hall farm and living expenses. The court excluded all evidence tending to show that the Halls made oral statements that they intended plaintiffs to have a part of the farm as further compensation for their services.

At the conclusion of plaintiffs' evidence defendants moved for a directed verdict, asserting, among other things, that the evidence was insufficient to show any agreement and that any possible claim on the basis of *quantum meruit* is barred by the three-year statute of limitations. Defendants' motion was allowed and plaintiffs appealed.

*L. H. Wall for plaintiff appellants.*

*No brief filed by attorney for defendant appellees.*

GRAHAM, Judge.

[1] Evidence tendered by plaintiffs in support of their claim for damages under an asserted contract consisted entirely of

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testimony as to oral statements, purportedly made by Mr. and Mrs. Hall, promising to leave a portion of their farm to plaintiffs by will in compensation for services rendered. An oral contract to devise realty is within the statute of frauds (G.S. 22-2) and is unenforceable, *Gales v. Smith*, 249 N.C. 263, 106 S.E. 2d 164; *Clapp v. Clapp*, 241 N.C. 281, 85 S.E. 2d 153, as is also an indivisible contract to devise real and personal property. *Mansour v. Rabil*, 277 N.C. 364, 177 S.E. 2d 849; *Pickelsimer v. Pickelsimer*, 257 N.C. 696, 127 S.E. 2d 557.

[2] Plaintiffs attempted to introduce a joint will executed by both Mr. and Mrs. Hall on 28 May 1945. This joint will, which Mrs. Hall subsequently revoked by executing a new will, contained a devise of certain real property to plaintiffs. Plaintiffs contend that the joint will constitutes a note or memorandum of the Halls' contract to devise their property, or a portion thereof, and sufficiently satisfies the statute of frauds. We disagree. "The mere exercise of the statutory right to dispose of one's property at death is not of itself evidence that the disposition directed is compelled by a contractual obligation." *McCraw v. Llewellyn*, 256 N.C. 213, 217, 123 S.E. 2d 575, 578. There is nothing in the will to indicate any binding obligation on the part of the Halls to make such a devise.

It is true that under certain circumstances a joint will may itself be a sufficient memorandum of an agreement between the parties to the will to satisfy the statute of frauds. *Mansour v. Rabil*, *supra*; *Olive v. Biggs*, 276 N.C. 445, 173 S.E. 2d 301; *Godwin v. Trust Co.*, 259 N.C. 520, 131 S.E. 2d 456. We know of no instance, however, where a simple devise of property in a will has been held to be evidence of a contract between the testator and the beneficiary. Plaintiffs make no contention that the joint will constitutes a contract between the Halls which plaintiffs, as beneficiaries, are entitled to enforce. We note in passing that the joint will contains no contractual language; and further, that the document was not acknowledged in accordance with the provisions of G.S. 52-6(a). See *Mansour v. Rabil*, *supra*.

[3] We hold that plaintiffs failed to present any competent evidence to show the special contract alleged. However, failure to prove a special contract would not preclude plaintiffs from having their case submitted to the jury, if their evidence was sufficient to support a recovery based on *quantum meruit*. *McCraw v. Llewellyn*, *supra*; *Grady v. Faison*, 224 N.C. 567,

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31 S.E. 2d 760; *McSwain v. Lane*, 3 N.C. App. 22, 164 S.E. 2d 77. Assuming for purposes of argument that the evidence here would support a recovery based on this theory, the question becomes: Is plaintiffs' claim for compensation for services, rendered and received upon the expectation that compensation would be paid, barred by the three-year statute of limitations applicable to contract actions, G.S. 1-52(1)? We answer in the affirmative.

In *Doub v. Hauser*, 256 N.C. 331, 337, 123 S.E. 2d 821, 825, the following pertinent rules are set forth:

"For recovery of compensation upon implied contract or *quantum meruit* for services rendered, the cause of action accrues according to circumstances as follows: (a) For indefinite and continuous service, without any definite arrangement as to time for compensation, payment may be required *toties quoties*. 'The implied promise is to pay for services as they are rendered, and payment may be required whenever *any are rendered*; and thus the statute is silently and steadily excluding so much as are beyond the prescribed limitation.' (Citations omitted.) (b) Where it is agreed that compensation is to be provided in the will of recipient, the cause of action accrues *when the recipient dies* without having made the agreed testamentary provision. (Citations omitted.) (c) Where it is agreed that services are to be rendered during the life of recipient and compensation is to be provided in the will of recipient, and the contract has been abandoned, the cause of action accrues *at the time of abandonment* of the contract. (Citations omitted.)"

Although plaintiffs state in their brief that this action was instituted on 26 July 1965, the stipulation appearing in the record is that "[s]ummons was issued Mch. 13th 1969 to the Sheriff of Caldwell County." The summons is not in the record. The amended complaint, which is the only complaint appearing in the record, indicates that it was filed 16 December 1969. The record also shows that a demurrer was filed by defendants on 30 December 1969 and the order overruling the demurrer recites that the suit was filed within one year after the death of Rhoda Hall. Rhoda Hall died 12 January 1965. Suffice to say, the state of the record makes it difficult to determine when this action was instituted.

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[4] If, as the stipulation in the record shows, summons issued 13 March 1969, that was the date on which this action was commenced. G.S. 1-88 (repealed effective 1 January 1970). This date was more than three years after the date of Mrs. Hall's death and the action would obviously be barred, irrespective of whether the cause of action accrued under circumstances set forth under (a), (b) or (c) in *Doub*.

Even if this action had been instituted on 26 July 1965, as plaintiffs state in their brief, it would nevertheless be barred by the statute of limitations. Plaintiffs' evidence shows that they performed none of the services for which they seek compensation after 1955. Thus, the statute would have excluded compensation, even for those last performed services, long before Mrs. Hall's death in 1965. Plaintiffs contend that it was agreed that compensation would be provided by will and that the cause of action consequently accrued in accordance with the circumstances set forth in (c) of *Doub*. However, as we have already held, plaintiffs failed to show any special agreement with respect to compensation. Therefore, their cause of action, if any, accrued under circumstances set forth in (a) of *Doub*.

We are of the opinion and so hold that plaintiffs' evidence conclusively established that their cause of action, if any, is barred by the statute of limitations.

Affirmed.

Judges MORRIS and PARKER concur.

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KINSTON BUILDING SUPPLY CO., INC. v. CHILTON MURPHY,  
ORIGINAL DEFENDANT, AND J. W. GRADY, ADDITIONAL DEFENDANT

No. 718DC532

(Filed 29 December 1971)

1. Accounts § 1; Sales § 10—action on account—evidence of the account—testimony of bookkeeper

In an action to recover on an account for building materials furnished to the defendant, it was proper to admit the testimony of plaintiff's bookkeeper showing the existence and amount of the account, since the bookkeeper had personally prepared the account in the regular course of business.

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**2. Rules of Civil Procedure § 50—motion for directed verdict — consideration of evidence**

Upon motion for directed verdict and for judgment *non obstante veredicto*, all of the evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor.

**3. Accounts § 1—action on account — sufficiency of evidence**

In an action instituted by a supply company to recover on an account for building materials furnished to defendant, the evidence warranted submission of the case to the jury.

**4. Appeal and Error § 26—exception to the judgment — question**

An exception to the judgment presents the face of the record for review, which includes whether the facts found or admitted support the judgment.

APPEAL by Chilton Murphy, original defendant, from *Nowell, District Judge*, 25 January 1971 Session of District Court held in LENOIR County.

This is a civil action instituted by Kinston Building Supply Co., Inc., to recover on an account for materials furnished to construct an addition to the house trailer occupied as the residence of the defendant Chilton Murphy. On 18 October 1965 the defendant Murphy answered the complaint and moved to have J. W. Grady made an additional party defendant. On 18 October 1965 the court entered an order making J. W. Grady a party defendant. In his answer to the complaint, the original defendant Murphy alleged that the plaintiff's agent, J. W. Grady, acting in the course of his employment and within the scope thereof, agreed to furnish such materials as necessary to construct an addition to the trailer occupied by the defendant as his residence for a total price of \$800, less 25% discount. The defendant Murphy also alleged that he made payment to the plaintiff of \$600 which was the full amount due pursuant to the contract made with plaintiff's agent, J. W. Grady.

In the cross-action against the additional defendant Grady, the defendant Murphy alleged:

"2. That if it be determined that the said J. W. Grady as of about the date of February 15, 1964 and thereafter, was not the agent, servant and employee of the said Kinston Building Supply Co., Inc., and at or about the times hereinafter alleged was not acting within the scope of his em-

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ployment and agency, the defendant, Chilton Murphy, is advised, informed and believes and so alleges that the said J. W. Grady did the acts and things hereinafter alleged to the detriment of this defendant and for which the said Chilton Murphy is entitled to recover of the said J. W. Grady."

The additional defendant Grady filed answer denying the material allegations of the cross-action. Before any evidence was heard, counsel for the plaintiff and the defendant Murphy entered into the following pertinent stipulation:

"2. That on or about March 15—March 27, 1964, thereabouts, from a period to July 1, 1967, during the time in question, Mr. J. W. Grady was acting for and on behalf of Kinston Building Supply Company as its agent and in the course of his employment and acting within the scope of his authority."

Plaintiff offered evidence tending to show that as a consequence of a conversation between plaintiff's agent, J. W. Grady, and the defendant Murphy, the plaintiff supplied certain building materials for the construction of an addition to the defendant's trailer.

J. W. Grady testified, "I made out most of the orders for the materials, but I don't remember for sure if I made out all of them. I either made every one or entered the order on the invoice."

Alice Fay Barwick, a witness for plaintiff, testified that she was employed by the plaintiff as a bookkeeper and that she prepared the account of Kinston Building Supply Company with Chilton Murphy by posting from the invoices and that the total amount of his account was \$1,246.67, and that \$600 had been paid on the account and credits for returned merchandise had been made to the account, leaving a balance unpaid of \$531.41. The defendant Murphy offered no evidence.

The following issue was submitted to and answered by the jury as indicated:

"What amount, if any, is the Plaintiff entitled to recover of the Defendant?

Answer: \$540.31."

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Supply Co. v. Murphy

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From a judgment entered on the verdict, the defendant Murphy appealed.

*Jones, Reed & Griffin by Thomas B. Griffin for plaintiff appellee.*

*William F. Simpson for defendant appellant.*

HEDRICK, Judge.

[1] Based on specific exceptions in the record, defendant challenges the testimony of the witness Alice Fay Barwick regarding the account in question. The defendant contends the court erred in admitting testimony of the witness "without proper foundation, identification, authentication and time of preparation of the record of the account subject of this action." We do not agree.

In 1 C.J.S., Account, Action on, § 16, p. 606, it is said:

"Any evidence, otherwise competent, which tends to show the existence or correctness of the account, or which tends to disprove its existence or correctness is admissible."

The evidence discloses the witness personally prepared the account of the defendant Murphy in the regular course of business by posting to the account from the invoices while she was employed as a bookkeeper for the plaintiff during the period of time the building materials were furnished for the construction of an addition to the defendant's residence. We hold the testimony of the witness Barwick was admissible to show the existence and correctness of the account.

[2, 3] The defendant assigns as error the court's denial of his motions for directed verdict and for judgment *non obstante veredicto*. Upon motion for a directed verdict and judgment *non obstante veredicto*, pursuant to G.S. 1A-1, Rule 50(a) and (b), the sufficiency of the evidence to take the case to the jury is drawn into question. All of the evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E. 2d 118 (1971); *Horton v. Insurance Co.*, 9 N.C. App. 140, 175 S.E. 2d 725 (1970); *Musgrave v. Savings*

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& *Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970). We hold there is sufficient evidence in the record requiring the submission of this case to the jury.

[4] We note that the testimony in the record tends to show that the balance due on the account was \$531.41; whereas the jury's verdict found that the plaintiff was entitled to recover of the defendant \$540.31. Judgment was entered on the verdict. The defendant has not raised any question regarding the discrepancy between the testimony and the verdict. He did except to the judgment. An exception to the judgment presents the face of the record for review, which includes whether the facts found or admitted support the judgment. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363 (1968); *White v. Perry*, 7 N.C. App. 36, 171 S.E. 2d 56 (1969). The record reveals that in its complaint the plaintiff sought to recover \$540.31 and that a verified copy of the account was attached to the complaint indicating that the balance due on the account was \$540.31. In addition, the evidence reveals that the bookkeeper, Alice Fay Barwick, forwarded a copy of the account to the defendant. In the instant case the judgment is supported by the verdict.

The defendant has failed to show prejudicial error in the trial.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

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STATE OF NORTH CAROLINA v. CARL VESTER TERRY

No. 7119SC765

(Filed 29 December 1971)

**1. Criminal Law § 104—motion for nonsuit—consideration of evidence—  
inconsistencies in testimony**

It was immaterial, on the question of nonsuit in a homicide prosecution, that the trial testimony of the State's chief witness was inconsistent with his testimony at the preliminary hearing.

**2. Criminal Law § 89—witness' prior statements**

Statements of a witness made prior to the trial are not to be treated as substantive proof, but they can be considered as bearing upon the witness' credibility.

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APPEAL by defendant from *Collier, Judge*, June 7, 1971 Session of RANDOLPH Superior Court.

The defendant was charged in a bill of indictment with the first-degree murder of Virginia Covington Leake, (Virginia).

At the trial the solicitor elected not to proceed on the charge of first-degree murder but to try the defendant on second-degree murder. The State relied on the testimony of an alleged eyewitness, Richard Louis Covington, the half brother of defendant and a relative by marriage of the decedent. Richard Covington testified that on December 25, 1969, he, the defendant and Virginia were at the defendant's house. The defendant and Virginia were in the defendant's bedroom. The witness testified that he heard an argument and went into the bedroom. He saw the defendant point a pistol at Virginia and then hit her with the pistol. It went off and she fell back.

On cross-examination Richard Covington admitted that he had made statements at the preliminary hearing which were inconsistent with his testimony at the trial. He admitted that he lied under oath at the preliminary hearing. The witness stated the reason for changing his testimony was that he had become a Christian since the preliminary hearing and now wanted to tell the truth.

The State also called as a witness W. E. Wright, Deputy Sheriff of Randolph County. He testified that he was called to the defendant's residence on December 25, 1969; that he found Virginia lying across a bed with a wound in her neck and that in his opinion she was dead.

At the close of the State's evidence the defendant made a motion to dismiss the case. The motion was denied.

The defendant offered no evidence.

The court charged the jury on second-degree murder, voluntary manslaughter and involuntary manslaughter.

The jury returned a verdict of guilty of involuntary manslaughter and judgment was entered imposing a prison sentence.

From the verdict and judgment, defendant appeals.

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*Attorney General Robert Morgan by Associate Attorney Walter E. Ricks III for the State.*

*Bell, Ogburn & Redding by J. Howard Redding for defendant appellant.*

CAMPBELL, Judge.

The defendant, by appropriate assignments of error, raises three questions on appeal.

1. Did the trial court err in denying defendant's motion to dismiss at the close of the State's evidence?

2. Did the trial court err in its instructions on the consideration of prior inconsistent statements by the witness, Richard Covington?

3. Did the trial court err in its instructions to the jury on the offense of involuntary manslaughter?

[1] In his first argument defendant contends that there was insufficient evidence of defendant's guilt to go to the jury. The defendant submits that the only evidence linking him with the death of deceased was the testimony of Richard Covington. It is argued that Covington's testimony at the preliminary hearing was inconsistent with his testimony at the trial and that this inconsistency bears directly on the weight of the State's evidence. On this basis the defendant contends that there was not sufficient evidence to go to the jury.

A clear statement of the law on this point was given by the North Carolina Supreme Court in *State v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107 (1950).

" . . . In ruling on such motion, [motion to dismiss] the court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense. The court merely considers the testimony favorable to the State, assumes it to be true, and determines its legal sufficiency to sustain the allegations of the indictment. Whether the testimony is true or false, and what it proves if it be true are matters for the jury. . . . "

Viewing the testimony of Richard Covington in the light most favorable to the State and assuming it to be true, there

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is ample evidence to go to the jury. The prior inconsistent statements of the witness do not have the effect of nullifying his testimony, but are simply for the consideration of the jury in determining the credibility of the witness. Stansbury, N.C. Evidence 2d, § 46, p. 90.

We find no error in the trial court's denial of defendant's motion to dismiss.

[2] The defendant next objects to the following segment of the trial court's charge to the jury on the effect of prior inconsistent statements:

"Evidence has been received as corroboration tending to show that at some earlier time, the witness, Richard Louis Covington, made a statement consistent with his testimony at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made, that it is consistent with the testimony of the witness at this trial, you can then consider this together with all the other facts and circumstances bearing upon the witness' truthfulness in deciding whether to believe or disbelieve his testimony at this trial. Evidence has been received tending to show that at an earlier time the witness, Richard Louis Covington, made a statement which conflicts with his testimony at this trial. You must not consider such earlier statements as the truth of what was said at that earlier time, because it was not made under oath at this trial. If you believe that such earlier statements were made, and it does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances as bearing upon the witness' truthfulness, in deciding whether you believe or disbelieve his testimony at this trial. . . ."

The defendant contends that this charge is ambiguous and contradictory. We do not agree.

The trial court has correctly charged that the prior statements of the witness are not to be treated as substantive proof, but that they could be considered as bearing on the witness' credibility. This is a correct statement of the legal effect of

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prior consistent and inconsistent statements. Stansbury, N.C. Evidence, 2d Ed., § 46, p. 90 and § 52, pp. 105-107. The trial court's charge in respect to this question is entirely proper. This assignment of error is overruled.

The defendant's final assignment of error is to the trial court's charge on involuntary manslaughter. We have carefully examined the trial court's charge on the offense of manslaughter. Taken as a whole, the charge is a fair and accurate presentation of the law. When the charge presents the law fairly and accurately, there is no ground for reversal even though some of the expressions, when standing alone, might be regarded as erroneous. *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966).

In the entire trial we find

No error.

Judges MORRIS and PARKER concur.

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STATE OF NORTH CAROLINA v. JACQUELINE M. MATHIS

No. 7119SC715

(Filed 29 December 1971)

Criminal Law §§ 83, 95—joint trial of husband and wife—admission of husband's statement

In a joint trial of a husband and wife for felonious larceny, it was proper to admit in evidence the husband's extrajudicial, inculpatory statement, where the statement neither implicated the wife nor violated the privileged communication rule of G.S. 8-57.

APPEAL by defendant from *Gambill*, Judge, 19 April 1971 Session of Superior Court held in CABARRUS County.

Defendant was jointly charged with her husband Cecil Mathis in a bill of indictment with (1) felonious breaking or entering, (2) felonious larceny, and (3) feloniously receiving stolen goods knowing them to have been feloniously stolen. The third count was voluntarily dismissed before trial, and a directed verdict of not guilty was ordered on the first count. Only the second count, felonious larceny, was submitted to the jury.

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**State v. Mathis**

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The State's evidence tended to show the following. At approximately 3 o'clock a.m. on 3 March 1970, Deputy Sheriff Robert J. Eury of the Cabarrus County Sheriff's Department was patrolling an area in the vicinity of Towel City Towel Company, Inc., and Specialty Dyers, two businesses which occupied the same building. When Deputy Sheriff Eury shone his light into the area of the Towel Shop, he observed a person underneath a trailer which was parked at the rear of the businesses. Upon investigation he found no one, but observed several cartons of cigarettes, towels, hosiery, and other items where the person had been seen. Further investigation revealed that a window to the building had been broken and that entry had been gained into the Towel City Towel Company store. Deputy Eury ascertained that the merchandise found beneath the trailer belonged to Towel City Towel Company. The inside of the store at the time of Deputy Sheriff Eury's investigation was in disarray. In the immediate vicinity of the Towel City Towel Company, officers discovered an abandoned vehicle which was registered in the names of Cecil and Jacqueline Mathis.

Approximately one hour after his investigation of Towel City Towel Company, Officer Eury confronted the defendant-appellant and her husband in a taxicab. Upon advising them of their Constitutional rights pursuant to the Miranda decision, Officer Eury and Officer C. A. Bennett, an officer with the Concord Police Department, questioned the defendant's husband. Her husband stated that they were in the taxicab on their way to Charlotte because someone had stolen their car. Upon noticing that their names matched the names of the owners of the car which was located in the vicinity of Towel City Towel Company, Officer Bennett placed the defendant-appellant and her husband under arrest.

At the Concord Police Department, Detective George H. Smith of the Concord Police Department, after again advising the defendant and her husband of their Constitutional rights, questioned each of them individually. Both gave approximately the same stories to Detective Smith. Defendant's story, in substance, was that she had allowed a stranger to drive her car and that the stranger drove the car to the warehouse and parked the car in a field. The stranger then told her to wait in the car and that he would return within a few minutes. When the stranger returned, he asked her to accompany him to the ware-

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house. She did and she assisted him in removing articles of merchandise from the warehouse. The defendant told Detective Smith that, upon seeing a police car in the vicinity shine its light at the warehouse, she ran.

Before this evidence was taken at the trial, the court conducted a *voir dire* and concluded as a matter of law that the statements were freely, voluntarily, and understandingly made to Detective Smith.

Defendants offered no evidence.

The jury returned a verdict of guilty and a judgment of confinement for a period of not less than three nor more than eight years was entered. Defendant appealed.

*Attorney General Morgan, by Associate Attorney Ricks, for the State.*

*Larry E. Harris for the defendant.*

BROCK, Judge.

Defendant's husband, Cecil Mathis, was tried jointly with her and was also convicted of felonious larceny. His appeal was heard by another panel of this Court.

When the State proposes to rely upon confessions, a trial of two or more defendants jointly is fraught with the difficulty of excluding from the confession of the declarant any reference to a co-defendant. See *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492. When the co-defendants in a joint trial are husband and wife, the State runs the danger of violating G.S. 8-57, and this danger is compounded by the rule laid down in *State v. Fox, supra*, when the State proposes to rely upon confessions of husband and wife in a joint trial. It is likely that the time saved in a joint trial of husband and wife, with or without the use of confessions, is not worth the risk of prejudicial error.

In this case, defendant Jacqueline M. Mathis has no grounds to complain that her extrajudicial, inculpatory statement was used in evidence against her. Upon plenary, competent evidence on *voir dire*, the trial judge found that her statements were freely, understandingly, and voluntarily made. Nevertheless, she assigns as error the allowance by the trial court of her husband's extrajudicial, inculpatory statement in evidence in their joint

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trial. She contends she suffered prejudicial error because of the violation of both the rule of *State v. Fox, supra*, and the rule of G.S. 8-57.

We quote verbatim Officer Smith's recitation of the statement made to him by defendant's husband.

"Q State what he told you about his activity on this occasion, Mr. Smith.

"A He stated that he was at the Oldsmobile Place here in Concord looking at some cars with a person he did not know from Charlotte; that when they started to leave the Oldsmobile place the stranger drove the car, and drove to a place behind the warehouse where the stranger got out of the car, and said he'd be back in a few minutes; he did return after a short while and asked him to come with him to the warehouse, he had some stuff he wanted to get; he stated that while they were at the warehouse with the stranger an officer came by and they ran. He said they were at the warehouse getting some stuff. He said he did not enter the building. He had accompanied the stranger there who said he had some stuff he wanted to get. The stuff was at the rear door of the building. After having talked to Cecil and Jacqueline Mathis, I subsequently had another conversation with both of them."

A close reading of the testimony discloses that, if any part of the husband's extrajudicial statement implicated the co-defendant wife, it was carefully deleted by the State. Thus, there was no violation of the rule of *State v. Fox, supra*, or of the rule of G.S. 8-57. The admission of the co-defendant husband's extrajudicial statement was not prejudicial to the co-defendant wife.

We have examined defendant's remaining assignment of error and, in our opinion, no error has been shown which requires or would justify a new trial.

No error.

Judges BRITT and VAUGHN concur.

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State v. Mathis

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STATE OF NORTH CAROLINA v. CECIL MATHIS, DEFENDANT

No. 7119SC730

(Filed 29 December 1971)

**1. Larceny § 7—prosecution—stolen goods—issue of ownership—sufficiency of evidence**

Sole evidence on the issue of the ownership of stolen goods, which consisted of a police officer's testimony, received without objection, that he ascertained the goods to be owned by a named towel company, is held sufficient to support a jury finding as to ownership.

**2. Criminal Law § 95—joint trial of two defendants—admissibility of codefendant's statement**

The admission of a defendant's statement which did not implicate his codefendant was not prejudicial error in this joint trial of the two defendants.

APPEAL by defendant from *Gambill, Judge*, 19 April 1971 Criminal Session of Superior Court held in CABARRUS County.

Defendant appeals from judgment entered upon a jury verdict finding him guilty of felonious larceny. He was charged with this offense jointly with his wife, Jacqueline M. Mathis, and the cases were tried together. The case of *State v. Jacqueline M. Mathis* is the subject of a separate appeal. For a more complete statement of the facts see opinion of Brock, Judge, in that case, filed this date.

*Attorney General Morgan by Assistant Attorney General Denson for the State.*

*Arthur Goodman, Jr., for defendant appellant Cecil Mathis.*

GRAHAM, Judge.

[1] Defendant contends the State failed to show who owned the property allegedly stolen and that his motion for nonsuit should have been allowed for this reason. Where the State offers no evidence identifying the owner of the property defendant is accused of stealing, nonsuit must be allowed. *State v. Mullinax*, 263 N.C. 512, 139 S.E. 2d 639.

The bill of indictment alleges the owner of the property in question as Towel City Towel Co., Inc. No official, agent or employee of the alleged corporate owner of the property testified. However, a police officer did testify that "I ascertained that this merchandise that I found underneath the trailer was

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State v. Mathis

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owned by Towel City Towel Company." No objection having been made to this testimony, it was before the jury and could be considered. *In re Dunston*, 12 N.C. App. 33, 182 S.E. 2d 9; *State v. Davis*, 8 N.C. App. 589, 174 S.E. 2d 865. Where testimony sufficient, if true, to establish a fact at issue is received in evidence without objection, a nonsuit cannot be sustained even if the only evidence tending to establish the disputed fact is incompetent. See *Skipper v. Yow*, 249 N.C. 49, 105 S.E. 2d 205.

We hold that the testimony of the officer, which was received without objection, constituted evidence sufficient to withstand defendant's motion for nonsuit made on the grounds ownership of the property was not shown.

[2] Defendant next assigns as error the admission in evidence of statements made by him and his co-defendant. Neither defendant testified and defendant contends that the admission of his co-defendant's statement was error. Had the statement of the co-defendant implicated defendant this assignment of error would be well taken. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620; *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481; *State v. Parrish*, 275 N.C. 69, 165 S.E. 2d 230. "[I]n joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately." *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492.

A close review of that portion of the co-defendant's statement which was related to the jury indicates that all references tending to implicate this defendant were deleted. There is nothing in the co-defendant's statement, as it was related to the jury, which reflects prejudicially on this defendant. We therefore overrule this assignment of error.

We have examined defendant's remaining assignments of error, and in our opinion no error has been shown which is sufficiently prejudicial to require a new trial.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

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State v. Able

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## STATE OF NORTH CAROLINA v. JAMES ABLE

No. 7126SC727

(Filed 29 December 1971)

**1. Criminal Law § 21—failure to serve defendant with warrant—arrest on capias—trial on indictment**

Fact that defendant was never served with a warrant but was arrested on a capias for failure to appear for trial, the warrant for defendant's arrest having been served on the wrong man, did not affect the validity of defendant's trial on an indictment for uttering a forged check.

**2. Arrest and Bail § 9—arrest on capias—refusal of bondsmen to sign bond—denial of bond**

Defendant's contention that he was in effect denied bond because he was unable to get a bondsman to sign his bond since he was arrested on a capias for failure to appear, the warrant having been served on the wrong man, and that denial of bond prevented him from finding witnesses to prepare his defense *held* without merit where the record fails to show that defendant was denied bond for such reason or that there were any witnesses who could have aided in the preparation of his defense and why counsel would not have been adequate to locate such witnesses.

APPEAL by defendant from *McLean, Judge*, 12 July 1971 Schedule B Criminal Session of MECKLENBURG Superior Court.

Defendant was tried on an indictment charging him with uttering a forged check. The original warrant for defendant's arrest was issued on 3 February 1969 but served on the wrong man. Although defendant had not been served with a warrant he was arrested on a capias on 11 November 1970 for failure to answer in court for the offense of uttering a forged check.

The State's evidence tended to show: Henderson Volkswagen, Inc. was broken into in January 1969. Certain blank checks were stolen and check #445, identified as State's exhibit #1, was one of the stolen checks. The signature on the check was not that of anyone employed at Henderson Volkswagen and was not an authorized signature. Defendant attempted to cash State's exhibit #1 at a small grocery in Charlotte on 31 January 1969.

Defendant contended and offered evidence tending to show that he was employed in New York on said dates and was not in Charlotte.

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State v. Able

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The jury found defendant guilty of attempting to utter a forged check and from judgment sentencing defendant to prison for a term of not less than 6 years 3½ months nor more than 9 years, defendant appealed.

*Attorney General Robert Morgan by Assistant Attorney General Edward L. Eatman, Jr., for the State.*

*Rodney L. Purser for defendant appellant.*

BRITT, Judge.

[1] Defendant assigns as error the denial of his timely made motion to abate the action and quash the indictment upon the ground that he was arrested on a capias when he had never been served with a warrant.

In *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961), the defendant before pleading to the bill of indictment, moved that the proceedings be stayed and abated. He contended he was denied due process of law because he was arrested when no warrant had been issued and because a preliminary hearing was not held. In that case the court held at page 413:

“When a person is arrested without a warrant, the arresting officer shall inform such person of the charge against him and shall immediately, or ‘as soon as may be,’ take him before a magistrate and, on proper proof, a warrant shall be issued; an officer failing to comply with these requirements is subject to penalties. G.S. 15-45 and G.S. 15-47. A preliminary hearing may be held unless waived by defendant. G.S. 15-85 and G.S. 15-87. But none of these statutes prescribes mandatory procedures affecting the validity of a trial. A preliminary hearing is not an essential prerequisite to the finding of an indictment in this jurisdiction. ‘We have no statute requiring a preliminary hearing, nor does the State Constitution require it. It was proper to try the petitioner upon a bill of indictment without a preliminary hearing.’ *State v. Hackney*, 240 N.C. 230, 237, 81 S.E. 2d 778. See also *State v. Doughtie*, 238 N.C. 228, 232, 77 S.E. 2d 642; *State v. Cale*, 150 N.C. 805, 808, 63 S.E. 958.”

We hold that the failure to serve a warrant on defendant in this case did not affect the validity of the trial.

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State v. Able

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[2] Defendant contends that he was, in essence, denied bond which was set at \$500, he being indigent and unable to get a bondsman to sign his bond since he was arrested on a capias for failure to appear. We find no merit in this contention. Assuming, arguendo, that this is the practice of bondsmen, defendant failed to show that he was refused bond for this reason. Also, defendant's contention that his denial of bond prevented him from aiding in finding witnesses to prepare his defense is without merit as he failed to present any evidence of witnesses that he would have been able to locate to assist in the preparation of his defense, and why counsel would not have been adequate to locate said witnesses.

Defendant's other assignments of error are deemed abandoned under Rule 28, Rules of Practice in the Court of Appeals of North Carolina, since there are no reasons or arguments set forth in defendant's brief in support of said assignments of error.

For the reasons stated, we find

No error.

Judges BROCK and VAUGHN concur.

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Gower v. Insurance Co.

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MACON GOWER, JR. v. AETNA INSURANCE COMPANY

No. 7110SC734

(Filed 12 January 1972)

**Insurance § 137; Rules of Civil Procedure § 41— action on fire policy — one-year limitation — original action dismissed without prejudice — allowance of 30 days to file new action**

Where plaintiff filed his original complaint to recover on a fire insurance policy within one year after the date of the loss as required under the terms of the policy, and the trial court thereafter dismissed the original action without prejudice under G.S. 1A-1, Rule 41(b), for failure to obtain proper service of process on defendant insurer, the court had authority under Rule 41(b) to specify in its order of dismissal that "any new action by plaintiff may be commenced within thirty days of the date of this order," and plaintiff's new action instituted within the thirty days allowed by the court's order but more than a year after the loss was not barred by the one-year limitation provided in the policy.

ON *certiorari*, upon application of defendant, to review judgment of *Bone, Judge*, 15 July 1971 Session of Superior Court held in WAKE County.

Plaintiff instituted the present action on 5 November 1970 to recover on a fire insurance policy issued by the defendant, Aetna Insurance Company (Aetna), alleging that he had sustained a fire loss on 7 June 1969 and that the defendant had failed to pay according to the terms of the policy. The defendant filed its answer on 2 December 1970, admitting the issuance of the policy but asserting as its fifth of eight defenses that any recovery by the plaintiff was barred by his failure to commence his action "within twelve months next after inception of the loss" as required by the insurance contract. The parties stipulated that the only provision of the policy pertinent to this appeal is that prescribing the twelve-month period in which an action on the policy must be commenced.

On 25 June 1971 Aetna filed a motion for summary judgment pursuant to the provisions of G.S. 1A-1, Rule 56, "on the grounds that the pleadings and the material facts about which there is no genuine issue establish as a matter of law" that Aetna was entitled to judgment in its favor because the record showed that the action was not commenced within one year after the date of the alleged loss as required by the terms of the insurance policy.

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Gower v. Insurance Co.

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Aetna's motion for summary judgment was heard and denied on 15 July 1971 by Judge Bone in a judgment reading as follows:

"This cause came on to be heard at the July 12th, 1971, Civil Session of the Superior Court of Wake County, upon the defendant's written motion for a summary judgment under the provisions of NCGS 1A-1, Rule 56, dated June 25, 1971. No affidavits were offered by either side and no oral evidence was offered by either side, the matter being heard upon the undisputed facts appearing of record, which facts are as follows:

(1) On April 7, 1970, the plaintiff, Macon Gower, Jr., instituted a civil action against Aetna Insurance Company upon the same claim as that which is involved in the present action, the former action being filed under No. 70 CVS 2131 and the present action being filed under the number 70 CVS 6703.

(2) That on April 7, 1970, plaintiff filed his complaint in said former action, attaching thereto a copy of the insurance policy sued upon.

(3) That on May 13, 1970, judgment by default and inquiry was rendered by the Clerk in favor of plaintiff and against defendant, but on May 15, 1970, the Clerk entered an order setting aside said default judgment.

(4) That on May 15, 1970, the defendant filed answer to said complaint, and subsequently certain interrogatories and stipulations not material to the matter now at hand, were filed in the record.

(5) That one of the defenses set out in said answer of defendant, was that the court lacked jurisdiction over the person of the defendant and the process and service of same in said action was insufficient.

(6) That on October 15, 1970, Hon. C. W. Hall, Judge presiding over the Superior Court of Wake County, heard a motion of the defendant for a dismissal of said former action, on the ground that the court lacked jurisdiction over the person of the defendant and that the process and service of process were insufficient; and on said October

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15, 1970, Judge C. W. Hall signed an order containing the following provision: 'That the purported service of process in this action be, and the same is hereby, quashed, this action being discontinued and this action is hereby dismissed pursuant to Rule 41B, without prejudice; provided, however, that any new action by plaintiff may be commenced within thirty days of the date of this order. The plaintiff shall pay the costs to be taxed by the Clerk.'

(7) That on November 5, 1970, after paying the costs in the former action, the plaintiff herein caused summons to be issued in the present action and same was served on the defendant Aetna Insurance Company on November 6, 1970.

(8) It appears upon the face of all the pleadings that this is an action on a fire insurance policy issued by defendant to plaintiff. The copy of the fire insurance policy attached to the complaint, marked Exhibit A, is incorporated into plaintiff's complaint.

(9) It appears on the face of all the pleadings that the fire on account of which this action was instituted is alleged to have occurred on June 7, 1969.

(10) Defendant's insurance policy, a copy of which is attached to plaintiff's complaint, is a standard fire insurance policy issued pursuant to the provisions of NCGS 58-176, and it contains the following required provision in lines 157 through 161: 'Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with and unless commenced within twelve months next after the inception of the loss.'

(11) The present action was instituted and complaint was filed on November 5, 1970, more than twelve months next after inception of the loss, which occurred on June 7, 1969, but less than thirty days after the aforesaid order of Judge Hall, which said order was entered on October 15, 1970.

After considering the uncontradicted record facts as set out above, and argument of counsel for both sides, the

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court is of the opinion, as a matter of law, that the said motion of defendant dated June 25, 1971, for a summary judgment in its favor dismissing this action under the provisions of NCGS 1A-1, Rule 56, should be denied.

NOW, THEREFORE, it is by the court, ORDERED, ADJUDGED AND DECREED that the said motion of defendant for a summary judgment in its favor dismissing this action be, and the same is hereby, DENIED."

Defendant excepted to the "signing, entry and filing" of the foregoing judgment and petitioned this court to issue the writ of certiorari, which petition was allowed.

*Dan Lynn and Earle R. Purser for plaintiff appellee.*

*Young, Moore & Henderson by Joseph W. Yates III and Joseph C. Moore for defendant appellant.*

MALLARD, Chief Judge.

There is no contention that the facts set forth in the foregoing judgment are incorrect. Defendant did not except to the findings of fact in the judgment but contends that the trial court erred as a matter of law when it denied defendant's motion for summary judgment.

In support of its contention, defendant relies upon the ruling in *Hodges v. Insurance Co.*, 233 N.C. 289, 63 S.E. 2d 819 (1951). The plaintiff there instituted an action against the defendant insurance company within one year after a fire loss covered by an insurance policy issued by defendant and in effect at the time of the loss. (The provisions of the insurance policy and the statute with respect to the time within which the action had to be brought were the same as in the case before us.) The action was dismissed for failure to properly serve process on the defendant by an opinion of the Supreme Court, certified 11 October 1950, which was more than one year after the loss. Thereafter, plaintiff, relying on the old statute (G.S. 1-25), instituted another action on 11 November 1950 for the same loss. Defendant demurred under the old rules of procedure on the grounds that the complaint did not state a cause of action in that it affirmatively appeared that the action was instituted more than one year after the inception of the loss and was barred by both the provisions of the statute and of

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the policy sued upon. The Court held that because the plaintiff had failed to sue out alias or pluries summons and had brought the new action after more than one year from the inception of the loss, his cause of action was discontinued under the provisions of the now-repealed statute, G.S. 1-95, and that the defendant's rights were unaffected by the pendency of the action *in personam* until it was properly served with process, or accepted service, or entered a general appearance. In so holding, the Court said:

“Thus it appears that the Legislature has expressly rejected the dismissal of an action for want of jurisdiction of the parties as a ground for suspending the statute of limitations so as to permit a new action within twelve months after the termination of the original action. The statute (G.S. 1-25) as now constituted is specific in its terms. *The language ‘the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested’ may not be held to include a dismissal for want of service of process.*

An action is commenced by issuing a summons. G.S. 1-88. Even so, in actions *in personam*, jurisdiction of the parties litigant can be acquired only by personal service of summons within the territorial jurisdiction of the court, unless there is an acceptance of service or a general appearance, actual or constructive. Though the action is conceived by the issuance of process, it remains dormant and without vitality until given life by the proper service of process. Until the party defendant is thus brought into court, his rights are unaffected by the pendency of the action. *In the absence of a clear declaration of a contrary intent by the Legislature, no other conclusion is permissible.*” (Emphasis added.)

We think that the Legislature made a clear declaration of a contrary intent when it repealed the old statutes, G.S. 1-25 and G.S. 1-95, and enacted the new Rules of Civil Procedure, effective 1 January 1970. This intent is expressed in the following pertinent portion of Rule 41(b) :

“For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. \* \* \* If the court specifies that the dismissal

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of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal."

We note that this new rule does not contain the restrictions contained in old G.S. 1-25; that is, that the "new action" may be brought only when the plaintiff's original action has been "nonsuited, or a judgment therein reversed on appeal, or is arrested." It is this language which the Court in *Hodges* held did not include a dismissal for want of service of process; but, as noted, the pertinent portion of Rule 41(b) contains no such limitation. The authority to determine in which cases it is appropriate to allow the plaintiff to commence a new action has been vested in the trial or hearing judge and is no longer strictly controlled by statute.

In the "Comment" appearing in the General Statutes under G.S. 1A-1, Rule 41(b), it is said:

"In respect to a motion for dismissal because of non-compliance with these rules or an order of court, the propriety of a dismissal will, of course, depend on the rule or order which has not been complied with. The rule does not undertake to say in what circumstances a dismissal will be proper any more than it attempts arbitrarily to declare what is a failure to prosecute."

The new rules also provide that a civil action is commenced by the filing of a complaint and, under some specified conditions, by the issuance of a summons. G.S. 1A-1, Rule 3. The first complaint in this action was filed within the time prescribed. There is no contention otherwise.

Rule 4 of the Rules of Civil Procedure provides for the issuance and service of summons. We do not have the record of the first suit before us because it was not included in this record, but apparently the summons therein was not properly served and the defendant moved to dismiss on that ground. Judge Hall heard the motion and ordered that "the *purported service* of process" be "quashed," determined that the action was discontinued, and then dismissed the action without prejudice pursuant to Rule 41(b). This dismissal was on defendant's motion. Judge Hall's order further provided that "any new action by plaintiff

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may be commenced within thirty days of the date of this order." (The order was dated 15 October 1970, and the present action was commenced on 5 November 1970, within the thirty-day period allowed.) Neither the plaintiff nor the defendant accepted to or appealed from Judge Hall's order, and it became the law of the case. See *Gaskins v. Insurance Co.*, 260 N.C. 122, 131 S.E. 2d 872 (1963). It seems clear from the uncontroverted findings of Judge Bone as to the contents of Judge Hall's order that the plaintiff did not obtain proper service of the summons in the first action and did not comply with the provisions of Rule 4(d) (which contains provisions similar to those in now-repealed G.S. 1-95) relating to extension, endorsement upon original summons, and alias and pluries summons.

Rule 4(e) reads as follows:

*"Summons—discontinuance.*—When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement."

In the first suit, the plaintiff had not complied with the rules relating to service of process. It is noted, however, that the defendant was apprised of the pendency of the action in some manner because it filed an answer and a motion to dismiss on the grounds that the process and service of process were insufficient.

Rule 4(e) and Rule 41(b) may appear to the casual reader to be in conflict, but when examined closely, it will be seen that they are not, and both can be given effect. The first action commenced by plaintiff was discontinued for failure to comply with the provisions of Rule 4(d) and (e), relating to service of process, but something else appears in this case. Under the statutory authority specifically granted in the last sentence in Rule 41(b), Judge Hall dismissed the old action without prejudice for plaintiff's failure to comply with the rules, and, in the exercise of his discretion, specified that the plaintiff might commence a new action within thirty days. No exception to or appeal from that order appears on this record.

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It is not controverted that the first action was commenced by the filing of a complaint within one year after the inception of the loss, and that the "new action" authorized by the order of Judge Hall was commenced within the time allowed therein. While the meaning of that portion of Judge Hall's order in which it is stated that the "purported service" of process be "quashed" is not clear, it may be disregarded because the holding that the action was discontinued was a definite holding, and the dismissal without prejudice was unequivocal.

By failing to comply with Rule 4(e), the plaintiff, after a year had elapsed from the date of the loss, had lost the right on his own initiative to breathe life into his discontinued action. Even the trial judge could not give that original action new life, but the Legislature has specifically given to the judge, under the quoted part of Rule 41(b), the discretionary and limited authority, not to resurrect that which was discontinued under Rule 4(e), but to give the plaintiff a new day and opportunity, in the interest of justice, to litigate his case on the merits. This authority was not given to the judge in the now-repealed statutes, G.S. 1-25 and G.S. 1-95, upon which the decision in *Hodges v. Insurance Co., supra*, was based, and this is what distinguishes the case before us from *Hodges*.

We hold, therefore, that Judge Bone correctly denied defendant's motion for summary judgment.

Affirmed.

Judges HEDRICK and GRAHAM concur.

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KENNETH L. JOHNSON, TRADING AS CAROLINA BEACH PIER  
v. GEORGE TENUTA & COMPANY

No. 715SC587

(Filed 12 January 1972)

**1. Insurance § 2—negligent failure of agent to procure insurance**

Where an insurance agent or broker undertakes to procure for another a policy of insurance affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed, and within the amount of the proposed policy, he may be held liable for the loss properly attributed to his negligent default.

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**2. Insurance § 2—agent's breach of contract to procure insurance—insufficiency of evidence**

Plaintiff's evidence was insufficient to show that defendant insurance agent had contracted to procure for plaintiff "complete and full insurance on plaintiff's pier" as alleged in the complaint, where it tended to show only that plaintiff took over from the previous owners the existing insurance policy which defendant had procured for them, sending to defendant through a real estate agent a check for the prorata portion accruing from the date plaintiff acquired title to the pier, and that defendant promised, without consideration, to get a copy of the existing policy for plaintiff and told plaintiff not to worry about it because he was "fully covered."

**3. Insurance § 2—agent's negligence in failing to procure insurance—absence of contract to procure insurance**

Defendant insurance agent could not be found negligent in failing to procure for plaintiff complete insurance protection against the particular risk which resulted in plaintiff's loss where defendant had not contracted to procure such insurance for plaintiff.

**4. Appeal and Error § 4—theory of trial in lower court—different theory on appeal**

Where a cause has been tried on one theory in the lower court, appellant will not be permitted to urge a different theory on appeal.

APPEAL by plaintiff from *Fountain, Judge*, 15 March 1971 Session of Superior Court held in NEW HANOVER County.

Civil action to recover \$7,500.00 damages which plaintiff alleged he sustained because of the failure of defendant, an insurance agent, to procure insurance on plaintiff's fishing pier. In his complaint plaintiff alleged that in February 1969, "the defendant agreed with the plaintiff to procure complete and full insurance coverage on the plaintiff's pier," and that defendant assured plaintiff that defendant "had procured such insurance which was in full force and effect and would continue in full force and effect until December 12, 1969, whereupon the plaintiff delivered to the defendant the sum of \$2,190.00 to pay the premium on the insurance which the defendant said he had procured." The complaint also contained allegations that in November 1969 plaintiff's pier was severely damaged by a windstorm; that the cost of repairing the damage exceeded \$7,500.00; that because of defendant's failure to procure the insurance which defendant agreed to procure and because of defendant's repeated assurances to plaintiff that defendant had procured such insurance, there was no insurance on plaintiff's pier when the storm occurred; and that plaintiff was therefore

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damaged in the sum of \$7,500.00, which sum plaintiff alleged he was entitled to recover of defendant. Defendant denied the material allegations of the complaint.

Upon the trial plaintiff testified in substance, except where quoted, as follows: Plaintiff bought the pier from T. J. Jackson and wife for the price of \$80,000.00. The sale was closed in February 1969 in the office of Kepley Real Estate Company, the real estate agency which represented the sellers. At that time there was insurance, which had been purchased by Mr. Jackson, already in force on the pier. Plaintiff sent his check by Kepley Real Estate Company to defendant to pay his part of the annual premium. The check, dated 8 February 1969 in the amount of \$2,190.00, bore on its face the notation "For Pier Insurance till 12-12-69." It was paid by plaintiff's bank on 13 February 1969. Plaintiff testified:

"As to whether or not I asked Mr. Kepley what the coverage was and what it covered, well Mr. Kepley just told me that he had had insurance with Mr. Tenuta for several years and as far as he knew he was reliable and I should have insisted on the policy, I guess, before I paid the money but I didn't. He was recommended to me. Mr. Kepley had done everything he said he would do during the transaction, which was a pretty good amount of money, and I didn't have any reason to question him, so I just took it for human nature, I guess. A little faith in human nature. At that time I had never seen Mr. Tenuta. Certainly never talked with him by telephone and never communicated with him by letter or other communication of any kind. All I knew about Mr. Tenuta was the name given to me by Mr. Kepley, the real estate agent who closed the transaction for the sellers from whom I purchased the pier."

Plaintiff's first contact with defendant was in a telephone call from plaintiff to defendant in which plaintiff asked for his policy. Plaintiff fixed the date of this telephone call variously as "March, March or April 1st, in the Spring of '69" and as "about June." Plaintiff testified:

"[H]e told me that he would get me the policy and not to worry about it because I was fully covered. He did not discuss with me what I was covered for or against. He said I was covered and not to worry about it."

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Plaintiff's next contact with defendant was in July 1969, when plaintiff inquired about liability insurance coverage for the pier and defendant undertook to obtain some figures on rates for such insurance. In this conversation plaintiff also asked about the policy "to cover what I paid him for" and defendant said "not to worry about it, I was covered but he would get me the policy." Plaintiff testified he never got the policy and had no further contact with defendant until after the storm. Plaintiff also introduced evidence as to the nature and extent of the storm damage to his pier and the cost of repairing the same. At the close of plaintiff's evidence, defendant's motion for a directed verdict under Rule 50(a) was denied.

Defendant then introduced evidence and testified that he had first placed insurance on the pier in January 1968, when he had placed insurance for the former owners to provide coverage against the hazards of fire, windstorm, and wave wash in the aggregate amount of \$25,000.00; that this coverage was required by the Small Business Administration, which held a mortgage on the property; that this was the same policy which was in effect at the time the pier was damaged in November 1969; that the annual premium, including tax, was approximately \$2,670.00; that he received a check from Mr. Jackson, the former owner, for his prorated portion of the annual premium for coverage from December 1968, and had received plaintiff's check from the real estate agency for plaintiff's part of the premium; that he had had no transactions with plaintiff personally in February 1969. Defendant also testified that plaintiff had later called to introduce himself and to talk about public liability insurance, but testified that plaintiff had never asked him to acquire any additional insurance on the pier.

Defendant introduced in evidence a copy of the insurance policy, which was effective for the period from 12 December 1968 to 12 December 1969. As originally written the policy named Mr. and Mrs. Jackson, the former owners, as the persons insured. It was amended by endorsement to show the plaintiff as the person insured. This policy provided insurance in the total amount of \$25,000.00, distributed over the pier, the tackle shop on the pier, and the contents of the tackle shop. The amount of insurance on the pier, which was the only thing damaged in the storm, was \$17,265.00. The policy contained an 80% co-insurance clause and a clause limiting the insurance

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company's liability to its proportionate part of the amount of each loss after deducting \$2,500.00. Defendant also introduced evidence to show that the value of plaintiff's pier was \$70,000.00, and by reason of the 80% co-insurance clause and the \$2,500.00 deductible clause, no payments had been made under the policy by reason of the loss which plaintiff sustained when the storm damaged his pier in November 1969.

At the close of all the evidence defendant again moved for a directed verdict pursuant to Rule 50(a) of the Rules of Civil Procedure, which motion was allowed. From judgment allowing defendant's motion and dismissing plaintiff's action, plaintiff appealed.

*Smith & Spivey by Jerry L. Spivey for plaintiff appellant.*

*Marshall, Williams, Gorham & Brawley by Alan A. Marshall and A. Dumay Gorham, Jr., for defendant appellee.*

PARKER, Judge.

[1] "It is very generally held that where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed and within the amount of the proposed policy he may be held liable for the loss properly attributed to his negligent default." *Elam v. Realty Co.*, 182 N.C. 599, 602, 109 S.E. 632, 633. Accord: *Wiles v. Mullinax*, 267 N.C. 392, 148 S.E. 2d 229. "To enforce such liability the plaintiff, at his election, may sue for breach of contract, or for negligent default in performance of duty imposed by contract." *Bank v. Bryan*, 240 N.C. 610, 83 S.E. 2d 485.

In the present case plaintiff has elected to sue for breach of contract. He has alleged an express agreement made in February 1969 whereby defendant agreed with plaintiff to procure "complete and full insurance coverage" on plaintiff's pier, and has further alleged that upon receiving assurance from defendant that such insurance had been procured, plaintiff paid defendant \$2,190.00 "to pay the premium on the insurance which the defendant said he had procured." Plaintiff did not allege that defendant failed to use due care in performance of the duty imposed upon him by the contract, but alleged simply

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that defendant had failed to perform as he had agreed to perform.

[2] Viewing the evidence in the light most favorable to plaintiff, as we are required to do in passing on an exception to the trial court's ruling on a motion for a directed verdict made by a defendant in a jury case under Rule 50(a) of the Rules of Civil Procedure, *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396, we find no evidence tending to establish the contract alleged in the complaint. When plaintiff purchased the pier in February 1969, he had never met, communicated with, or had any contact of any nature with defendant or with anyone authorized to represent defendant. Plaintiff simply took over from the previous owners the existing insurance policy which defendant had procured for them, sending to defendant through the real estate agent a check for the prorata portion of the premium accruing from and after the date plaintiff acquired title to the pier. Plaintiff's first contact of any nature with defendant occurred a substantial period of time later, and his total contacts with defendant prior to the storm consisted only of two brief conversations. In neither of these did plaintiff request nor did defendant agree to procure any insurance whatsoever in addition to that which was already in force. At most, the evidence shows merely that defendant promised, without consideration, to get a copy of the existing policy for the plaintiff, and that defendant told plaintiff not to worry about it because he was "fully covered." Plaintiff admitted, however, that defendant had not discussed with him what plaintiff was covered for or against. The vague assurance that plaintiff was "fully covered," volunteered by defendant without consideration, was not sufficient to support a finding that defendant thereby contracted with plaintiff to procure a policy of insurance affording plaintiff complete protection against the particular risk which resulted in plaintiff's loss.

[3, 4] While, as above noted, plaintiff grounded his action in contract and not in tort, had plaintiff by appropriate allegation sought to base his action on the theory that defendant was actionably negligent, the evidence would also have been insufficient to support a recovery upon that theory. As above noted, the evidence would not support a finding that defendant had contracted to procure insurance affording plaintiff complete protection against the particular risk which resulted in his loss,

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and defendant could not be found negligent in failing to perform a duty which he had never contractually undertaken to perform and which was not otherwise imposed on him by law. While, in view of the 80% co-insurance and the \$2,500.00 deductible clauses, it may now appear that plaintiff's pier was underinsured, there is no evidence that defendant knew the value of the pier or that his advice had been sought or given as to the amount or type of insurance which should have been carried. In this regard the evidence shows no more than that defendant, at the request of the former owners, had procured insurance of the type required to satisfy the Small Business Administration, holder of a mortgage on the pier. In view of the very high premium, such insurance may have been all that a prudent businessman would have carried. Plaintiff did not allege or at the trial seek to base his action on the theory that defendant was actionably negligent in failing to furnish plaintiff a copy of the existing policy and in telling plaintiff not to worry because he was "fully covered," thereby lulling plaintiff into a feeling of false security which proximately caused his loss. He may not for the first time pursue such a theory on this appeal. "Where a cause has been tried on one theory in the lower court, appellant will not be permitted to urge a different theory on appeal." 1 Strong, N.C. Index 2d, Appeal and Error, § 4, p. 108. Had plaintiff pursued such a theory at the trial of this case, an issue as to plaintiff's contributory negligence would have arisen. "Where, in a case of this kind, the action is for tort, and there is a negligent default on the part of the plaintiff contributing to the injury, this would have the effect of defeating the action." *Elam v. Realty Co.*, *supra*.

We find no error in the judgment directing verdict for the defendant. We have reviewed plaintiff's remaining assignments of error and find them without merit. The judgment appealed from is

Affirmed.

Judges CAMPBELL and MORRIS concur.

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**STATE OF NORTH CAROLINA v. LEO THADDEUS FOUST**

No. 7115SC747

(Filed 12 January 1972)

**1. Constitutional Law § 32; Criminal Law § 145.1—probation—condition that defendant reimburse State for court-appointed counsel**

A condition of probation requiring the defendant to reimburse the State for cost of court-appointed counsel does not infringe defendant's constitutional right to counsel.

**2. Criminal Law § 145.1—purpose of probation**

The primary purpose of probation is to further reform the defendant.

**3. Criminal Law § 145.1—probation—rehabilitation of defendant—payment of court-appointed counsel**

One effective way to awaken a probationer's sense of social responsibility and aid in his rehabilitation is to require him to repay costs, including fees for court-appointed counsel, which society has incurred as a result of his misconduct.

**4. Criminal Law § 145.1—condition of probation—statutory list of conditions**

The fact that a condition of probation is not among those specifically listed as permissible under G.S. 15-199 does not prevent the court from imposing it.

**5. Criminal Law § 145.1—remand of revocation hearing—failure to make findings of fact**

Revocation of probation hearing is remanded for failure of the trial court to make sufficient findings of fact as to whether defendant's failure to comply with the conditions of probation was wilful or without lawful excuse.

APPEAL by defendant from *Hobgood, Judge*, 16 August 1971 Session of Superior Court held in ALAMANCE County.

This appeal is from an order revoking defendant's probation and activating his suspended sentence.

In May of 1970 defendant, a 17-year-old male, entered pleas of guilty to three charges of nonfelonious breaking and entering and three charges of nonfelonious larceny. The cases were consolidated for judgment and judgment was entered imposing a jail sentence of two years. Sentence was suspended and defendant was placed on probation for five years. Conditions of his probation included a requirement that he pay \$10 a week into the office of the clerk of court until the sum of

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\$174 for court costs and \$50 for restitution for the property stolen had been paid.

In January of 1971 defendant was brought before Judge Bickett upon allegations that he had failed to make payments as required and was in arrears in the amount of \$189. On 18 January 1971, Judge Bickett entered an order continuing defendant on probation, ordering that he pay the arrearage by 22 January 1971, and, as an additional condition of probation, ordering that defendant reimburse the State for fees paid his court-appointed counsel by paying into the office of the Clerk of Superior Court \$100 on or before 18 March 1971 and an additional \$100 on or before 1 May 1971.

In July of 1971 defendant's probation officer reported that defendant was behind in payments due under the January order in the amount of \$254. A hearing was held before Judge Hobgood, and in an order dated 13 August 1971, Judge Hobgood found that defendant had wilfully violated the conditions of the order of 18 January 1971 by failing to make payments as ordered. Based upon this finding, defendant's probation was revoked and his suspended sentence activated.

Defendant was represented by privately retained counsel at his trial; however, before both hearings on the question of his failure to comply with conditions of probation, defendant was adjudged an indigent and counsel was appointed to represent him. He appeals to this Court as a pauper.

*Attorney General Morgan by Associate Attorney Speas for the State.*

*Long, Ridge & Long by Paul H. Ridge for defendant appellant.*

GRAHAM, Judge.

[1] Defendant contends the condition of probation requiring him to reimburse the State for cost of court appointed counsel infringes his constitutional right to counsel. "A condition which is a violation of the defendant's constitutional right, and, therefore, beyond the power of the court to impose, is *per se* unreasonable and subject to attack by the defendant upon the State's subsequent motion to put the sentence into effect for violation of that condition." *State v. Caudle*, 276 N.C. 550, 173 S.E. 2d 778.

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In support of this contention defendant cites *In re Allen*, 71 Adv. Cal. 409, 455 P. 2d 143, 78 Cal. Rptr. 207. There, the California Supreme Court unanimously held a similar requirement invalid on grounds it constituted "an impediment to the free exercise of a right guaranteed by the Sixth Amendment to the Constitution. . . ." The court reasoned that indigent defendants would likely be discouraged from exercising their Sixth Amendment right to counsel if faced with the possibility of having to pay the costs in the event of probation. Assuming that such a likelihood does exist (an assumption we incidentally find difficult to make), we nevertheless fail to view it as an unconstitutional impediment.

A defendant may be held accountable for breaching the conditions of his probation only if the court finds facts showing that the breach is willful, *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476; *State v. Morton*, 252 N.C. 482, 114 S.E. 2d 115, or that it is without lawful excuse. *State v. Robinson*, 248, N.C. 282, 103 S.E. 2d 376; *State v. Caudle*, 7 N.C. App. 276, 172 S.E. 2d 231 (*rev'd on other grounds*, 276 N.C. 550, 173 S.E. 2d 778); *State v. Butcher*, 10 N.C. App. 93, 177 S.E. 2d 924. A probationer's inability to pay is a lawful excuse for his failure to comply with a probationary condition to reimburse the State for counsel fees unless, of course, the inability results from a lack of reasonable effort by defendant to obtain and have available the necessary funds. Consequently, the question an indigent faces is not whether he should refuse counsel rather than risk being jailed if he remains financially unable to pay, but simply whether he is willing to incur the financial obligation of counsel in the event of a probationary sentence. Nonindigent defendants must make similar choices. That nonindigents may be discouraged from engaging counsel by the fact they are required to pay does not mean that the State must provide them free counsel, or that a reluctance on their part to incur cost of counsel unconstitutionally impedes their right under the Sixth Amendment. We know of no reason, and none has been suggested to us, why indigents should be placed in a preferred position by being relieved of choices that naturally arise to all defendants.

The decision in *Allen* appears to have been greatly influenced by the U. S. Supreme Court decisions in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963), and

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*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

In *Gideon* it was noted that in an adversary system of criminal justice, an accused who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. The Supreme Court stated: "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals *in which every defendant stands equal before the law*. This noble idea cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." (Emphasis added.) 372 U.S. at 344.

In *Miranda* the Supreme Court stated: "If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. *The financial ability of the individual has no relationship to the scope of the rights involved here.*" (Emphasis added.) 384 U.S. at 472.

We are not persuaded that a probationary requirement providing that an indigent defendant reimburse the State for the cost of his attorney does violence to the principles set forth in *Gideon* and *Miranda*. In discussing this question in 58 Calif. L.Rev. 255, the author points out that the emphasis in these cases was on assuring that indigents will not be discriminated against in criminal trials because of their status. He states: "Thus, the United States Supreme Court was concerned in these cases with making indigents equal with other members of society before the bar of justice and not with putting them in a preferred position. The latter result would, of course, be the logical consequence of providing indigents with representation free of charge while denying the same advantage to nonindigents, particularly those with moderate to low incomes."

[2, 3] Not only do we find the requirement in question free from constitutional objection, we think the practice of imposing this type of requirement as a condition of probation may serve a useful purpose in rehabilitating probationers. The primary purpose of probation is to further reform the defendant. *State v. Smith*, 233 N.C. 68, 62 S.E. 2d 495. There is no such thing as a free defense. Either a defendant pays the cost or society

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pays it for him. Certainly one effective way to awaken a probationer's sense of social responsibility and aid in his rehabilitation is to require him to repay costs which society has incurred as a result of his misconduct. For a general discussion of policy considerations in this area see Comment, *Reimbursement of Defense Costs as a Condition of Probation for Indigents*, 67 Mich. L.Rev. 1404 (1969); and Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn. L.Rev. 1, 25 (1963).

Dicta in the case of *Rinaldi v. Yeager*, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed. 2d 577 (1966), suggests that the Supreme Court of the United States does not view as objectionable a requirement that indigent defendants make reimbursement for their defense costs as a condition of probation. The Court held unconstitutional a New Jersey statute which required the prison wages of unsuccessful indigents to be withheld in order to pay the cost of furnishing them trial transcripts for use on appeal. Since no similar obligation was imposed on indigents who were convicted but not imprisoned, the court held the statute in violation of the equal protection clause of the Federal Constitution. However, the court stated: "We may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures." 384 U.S. at 309. The State argued that the classification was justified because of administrative difficulties involved in collecting from those convicted but not imprisoned. The court responded to this argument by stating: "Any supposed administrative inconvenience would be minimal, since repayment could easily be made a condition of probation or parole. . . ." 384 U.S. at 310.

Defendant further contends that, aside from Federal constitutional consideration, it is unreasonable to require him to pay court costs and cost of counsel as a condition of probation.

[4] G.S. 15-199 grants the court broad authority to impose conditions of probation. The fact the conditions involved here are not among those specifically listed as permissible under the statute is not determinative because the statute provides: "The court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following, or any other. . . ." (Emphasis added.)

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The costs which defendant finds objectionable were necessitated by his misconduct. In our opinion they are directly related to his criminal acts and it is therefore not unreasonable to require defendant to make reimbursement. *Cf. State v. Caudle*, 276 N.C. 550, 173 S.E. 2d 778.

[5] Although we find the conditions defendant is charged with violating to be valid, the case must nevertheless be remanded because in revoking defendant's probation the trial judge did not make findings of fact sufficient to support a conclusion that defendant's failure to comply was willful or without lawful excuse. The extent of His Honor's findings is that defendant was ordered to pay certain sums of money and "[t]he Court finds as a fact that this has not been paid."

The record shows that defendant was indigent at the time of both probationary hearings. Has he had the financial ability to comply with the judgment at any time since he became obligated to pay? If not, has his continued inability to pay resulted from a lack of reasonable effort on his part or from conditions over which he had no control? These are essential questions which must be answered by appropriate findings of fact before the court can determine whether defendant's failure to comply was willful or without lawful excuse.

The judgment activating the sentence is vacated and the proceeding is remanded for further hearing in order that the judge may determine, by appropriate findings of fact, whether the failure of defendant to make the required payments was willful or without lawful excuse. The judge's findings of fact should be definite and not mere conclusions. *State v. Robinson, supra*; *State v. Caudle*, 7 N.C. App. 276, 172 S.E. 2d 231 (*rev'd on other grounds*, 276 N.C. 550, 173 S.E. 2d 778).

Remanded.

Chief Judge MALLARD and Judge HEDRICK concur.

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**Barr v. Telephone Co.**

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**PHILLIP BARR v. SOUTHERN BELL TELEPHONE AND  
TELEGRAPH COMPANY**

No. 7121SC531

(Filed 12 January 1972)

**1. Privacy—right of privacy — cause of action — damages**

North Carolina has recognized a cause of action for an invasion of an individual's right of privacy and has recognized in such instances a right to nominal damages where special damages cannot be shown.

**2. Privacy—right of privacy — action against telephone company — ad in yellow pages — use of wrong picture**

Where plaintiff testified that he contracted with the defendant telephone company to insert in the yellow pages his employer's advertisement, which was to include plaintiff's photograph and name, and that the telephone company published a picture of someone other than plaintiff and placed plaintiff's name below the picture, plaintiff offered sufficient evidence to support a jury finding that the telephone company had invaded his right of privacy and that he was entitled to nominal damages at least.

**APPEAL** by plaintiff from *Lupton, Judge*, 15 March 1971  
Session of Superior Court held in FORSYTH County.

Plaintiff instituted this action to recover damages for invasion of his privacy by defendant in the publication of an advertisement in the yellow pages section of defendant's 1970 Winston-Salem telephone directory.

The basic facts, which are not in dispute, disclose the following: Plaintiff is the customer service director for American Rug Cleaning Company, Inc., of Winston-Salem. In this capacity he handles all advertising contracts, takes the customer's telephone orders, goes into homes to make estimates of charges for rug cleaning, and handles customer's complaints. Plaintiff prepared an advertising "layout" to be published in the yellow pages section of defendant's 1970 Winston-Salem telephone directory. Among other things, the planned advertisement contained a picture of plaintiff with plaintiff's name appearing thereunder plus the designation "customer service." When the directory was published and distributed for 1970, the advertisement for American Rug Cleaning Company was printed as prepared by plaintiff except that a picture, or likeness, of someone other than plaintiff was, through error, substituted for that of plaintiff. The picture which erroneously appeared in the adver-

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tisement over plaintiff's name did not tend to degrade plaintiff in the eyes of the public; however, it was the picture of an older man.

At the time of contracting for the advertisement, the president of plaintiff's employer signed the contract for publication. In addition plaintiff personally signed an agreement which reads as follows:

"The undersigned, Phillip A. Barr, hereby consents to the use, publication, distribution and display of any portrait, picture, film or photographic reproduction of myself, and of any prints or copies thereof or therefrom, in whole or in part, for advertising purposes, and for purposes of trade or otherwise, in the discretion of the advertiser or user of the advertising space in a telephone directory or in the discretion of the Southern Bell Telephone and Telegraph Company or its associated companies, or either of them, or its or their successors or assigns.  
Dated, February 19, 1970.

PHILLIP A. BARR  
2380 Old Lexington Rd.,  
Winston-Salem"

Appearing after plaintiff's signature to the above agreement, is a further agreement which seems to be designed for execution by the purchaser of advertising (in this case plaintiff's employer). However, this further agreement was also signed by plaintiff individually. It reads as follows:

"Southern Bell Telephone and Telegraph Co.  
Atlanta, Georgia

The undersigned agree(s), in consideration of the acceptance and publication of the undersigned's advertisement in your Telephone Directory or Directories that I (we) will defend and protect the Southern Bell Tel. & Tel. Co. in any suit or legal proceeding based upon or arising out of the use or publication by it or its associated companies and save it and them harmless from any and all loss, expense or damage of any kind or character which it may sustain or be subjected to by reason of the publication therein of the attached photograph or any part thereof, and that said

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photograph is a photograph of \_\_\_\_\_ who signed the above consent, the use of which photograph or any part thereof is covered by such consent.

PHILLIP A. BARR"

The contract for advertisement which was entered into between plaintiff's employer and defendant contained the following statement under the section entitled "Terms and Conditions":

- "6. The Telephone Company's liability on account of errors in or omissions of such advertising shall in no event exceed the amount of charges for the advertising which was omitted or in which the error occurred in the then current directory issue and such liability shall be discharged by an abatement of the charges for the particular listing or advertisement in which the omission or error occurred."

On the first page of the yellow pages section of defendant's directory the following appeared:

"The Yellow Pages are published for the benefit and convenience of our subscribers. Each business subscriber is listed under one general classification without cost. The Telephone Company assumes no responsibility or liability for errors or omissions occurring in the Yellow Pages. Errors or omissions will be corrected, in a subsequent issue, if reported by letter to the Company."

After the error was called to defendant's attention by plaintiff's employer, defendant abated the charges to plaintiff's employer for the advertisement. No public statement or announcement has been made or printed by defendant with respect to the error.

Defendant caused the deposition of plaintiff to be taken, wherein plaintiff testified, among other things, as follows:

"It would be fair to say that, from my testimony, I have had no actual loss of money as a result of the mistake in the publication of the photograph other than my own in the yellow pages. I don't claim to have had any actual money damages.

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"I don't make any claim that the telephone company made this mistake deliberately. As to the damages I contend to have sustained by reason of this mistake, I wouldn't know about the monetary loss. I haven't spent any money to print a card or ad or anything attempting to correct it. As to damages other than money, I have received an awful lot of calls on the ad from different customers. Just customers that called and wanted information about it from the ad. They will read the ad and then they will call me and talk to me, and they say, 'Well, I've seen your picture here in the ad,' and being that it's not my picture I feel that I'm obligated to tell them that it is not me. This goes on, you know, all the time because the ad stays in the phone directory. As to what I say to them in explaining that it is not my picture, I tell that I'm 23 years old and that the telephone directory made a mistake and printed the wrong picture. The picture in the ad appears to be a much older man. In some instances, the people who called in were people I knew, and in other instances were people I did not know. They were calling in response to the ad. The telephone number, the name of the company and my name in the ad are all correct. By referring to this ad, they are able to get in touch with the right person at the right place, calling the right number.

"As to any other way I claim to have been damaged, when I go into someone's home and they have called in reference to the ad and I present my business card that has my name and the company name and so forth on it, a lot of times I am questioned as to who I am and then I have to go through the whole explanation again, that the telephone company made an error. It is very nauseating—I guess would be a good word—after a while. At first people thought it was funny and everyone laughs about it, but I don't laugh very much. In each instance, I have been able to explain that it was a mistake. The customer has accepted my explanation. Those would be the only two ways in which I would say that there has been damage. I have no way of knowing whether I have lost any customers on account of the ad. As a result of the ad, I have received telephone calls from new customers."

The matter was heard upon defendant's motion for summary judgment. After considering the pleadings, plaintiff's dep-

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osition, defendant's answers to plaintiff's interrogatories, and the affidavit of an officer of defendant, Judge Lupton was of the opinion that there was no genuine issue of fact to be submitted to the trial court, and entered summary judgment for defendant. Plaintiff appealed.

*Wilson, Morrow & Boyles, by John F. Morrow, for plaintiff.*

*Womble, Carlyle, Sandridge & Rice, by William F. Womble and James C. Frenzel, for defendant.*

BROCK, Judge.

[1] Plaintiff's complaint and evidence before the trial judge, and his entire argument on this appeal, are centered upon his contention that defendant has invaded plaintiff's right of privacy. North Carolina has recognized, as have most states, a cause of action for an invasion of an individual's right of privacy, and has recognized in such instances a right to nominal damages where special damages cannot be shown. *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55.

For discussions of the beginning and development of the recognition of a cause of action for invasion of an individual's right of privacy and discussions of the nature of the privacy so protected, see: *Peck v. Tribune Co.*, 214 U.S. 185, 53 L.Ed. 960, 29 S.Ct. 554 (1908); *Flake v. News Co.*, *supra*; *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905); *Sinclair v. Postal Telegraph & Cable Co.*, 72 NYS 2d 841; Annot., "Invasion of Privacy by Use of Plaintiff's Name or Likeness for Nonadvertising Purposes," 30 ALR 3d 203; Annot., "Invasion of Privacy by Use of Plaintiff's Name or Likeness in Advertising," 23 ALR 3d 865; Annot., "Right of Privacy," 14 ALR 2d 750; Annot., "Right of Privacy," 14 ALR 2d 750 (ALR 2d Later Case Service); Annot., "Right of Privacy," 168 ALR 446; Annot., "Right of Privacy," 138 ALR 22; Hofstadter and Horowitz, *THE RIGHT OF PRIVACY*, (1964); Prosser, *LAW OF TORTS*, § 117 (4th ed. 1971); ALI *Restatement of Torts*, § 867; Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890); Nizer, *The Right of Privacy*, 39 Mich. L. Rev. 526 (1941); Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960); Gordon, *Right of Property in Name Likeness, Personality and History*, 55 Nw. U. L. Rev. 553 (1961); Bloustein, *Privacy as an*

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*Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962 (1964).

[2] In the case now before us, the evidence tends to show that plaintiff consented that his privacy could be invaded by defendant to the extent of publishing his name and picture together in his employer's advertisement. The evidence further tends to show that defendant published the likeness of someone other than plaintiff and published plaintiff's name as identification of the person whose likeness was published.

This evidence would justify, although not compel, the jury to find that defendant had gone beyond the scope of plaintiff's consent and thereby had invaded plaintiff's right of privacy. Such a finding by the jury would entitle plaintiff to an assessment of nominal damages even though he may not be able to show special damages.

In our opinion the trial judge committed error in granting summary judgment for defendant.

Reversed.

Judges VAUGHN and GRAHAM concur.

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JANET B. WHITEHEAD v. CHARLES D. WHITEHEAD

No. 71DC647

(Filed 12 January 1972)

1. Actions § 2; Parent and Child § 7; Rules of Civil Procedure § 68.1—child support order—children living in Bermuda—enforcement of order

The clerk of superior court had jurisdiction to enter an order requiring that a father residing in this State shall provide for the support of his children who were living in Bermuda and who had never been residents of the State, where the clerk had obtained *in personam* jurisdiction of the father, who had entered into a judgment by confession for the support of the children. G.S. 1A-1, Rule 68.1(a); U. S. Constitution, Art. IV, § 2.

2. Parent and Child § 7—child support—ratification by the father

A father who ratified and acquiesced in a child support judgment by making payments into the clerk's office pursuant thereto could not thereafter complain that the judgment was fatally defective.

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**3. Appeal and Error § 39—dismissal of appeal—failure to docket in apt time**

Appeal is dismissed for failure of the defendant to docket the record on appeal within the time prescribed by Rule 5 of the Rules of Practice in the Court of Appeals.

**4. Divorce and Alimony § 22; Parent and Child § 7—child support order—imprisonment of father without notice and hearing**

Portion of a child support judgment which provided, upon the default of the father, for the father's imprisonment without notice and hearing was invalid.

APPEAL by defendant from *Carlton, Judge*, 26 May 1971 Session of District Court held in EDGECOMBE County.

This is a civil action heard on plaintiff's motion to attach the defendant as for contempt for his willful failure to comply with the court's order to support his minor children. Prior to the hearing on plaintiff's motion, the parties entered into the following pertinent stipulation:

"1. That plaintiff, Janet B. Whitehead, is a resident of Bermuda and has never been a citizen of the United States.

2. That defendant, Charles D. Whitehead, has been a resident of Edgecombe County since prior to June 11, 1969, and has been a citizen of the United States continuously since his birth.

3. That plaintiff and defendant were legally married in 1957 and that during their marriage three children were born (namely: (1) Jennifer Marie Whitehead, whose date of birth is October 10, 1957, (2) Liza Ann Whitehead, whose date of birth is February 21, 1961, and (3) Shelly Suzette Whitehead, whose date of birth is December 24, 1962).

4. That Jennifer Marie Whitehead was born in Bermuda but moved to the United States in 1958 and lived with defendant in the United States for four years.

5. That both Liza Ann Whitehead and Shelly Suzette Whitehead were born in the United States.

6. That defendant signed a paper writing purporting to be a 'Confession of Judgment' for the support of his three children on June 11, 1969, and that on the same date the Assistant Clerk of Superior Court of Edgecombe County

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entered an Order upon said paper writing, a true copy of which is attached, marked as Exhibit A, and incorporated herein by reference.

7. That over the past fifteen months since the date set for the first payment under the paper writing purported to be a 'Confession of Judgment,' the defendant has made seven partial payments to said Clerk under said Order, but on eight other months defendant has not made any payments at all.

8. That defendant is presently employed as a bus driver, a position he has held for more than twelve months."

Exhibit A, referred to in the stipulation above, is as follows:

"EXHIBIT A — CONFESSION OF JUDGMENT

I, Charles D. Whitehead, the defendant in the above entitled action, do hereby confess judgment in favor of Janet B. Whitehead, the plaintiff herein, in the amount or amounts hereinafter provided, for support of my three children, and authorize the entry of judgment therefor.

This Confession of Judgment is for child support of my three children (namely: (1) Jennifer Marie Whitehead, whose date of birth is October 10, 1957; (2) Liza Ann Whitehead, whose date of birth is February 21, 1961; and (3) Shelley Suzette Whitehead, whose date of birth is December 24, 1962) which were born of my marriage with the plaintiff, who has custody of said children and resides at West Side, Somerset, on the Island of Bermuda. The indebtedness, confessed by this Judgment, shall become justly due by the defendant to the plaintiff on the fifth day of each month, beginning on the fifth day of July, 1969, and shall continue for each month thereafter until the oldest child shall reach the age of eighteen years, or shall marry, whichever first occurs, at which time the indebtedness due the plaintiff for such child support shall be reduced by the sum of Twenty-Five Dollars per month, until the second oldest child shall reach the age of eighteen years, or shall marry, whichever first occurs, at which time the indebtedness due the plaintiff for such child support shall be reduced further by the sum of Twenty-Five Dollars per month, until the youngest child shall reach the age of

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eighteen years, or shall marry, whichever first occurs, at which time the indebtedness due the plaintiff by defendant for child support shall cease.

s/ CHARLES D. WHITEHEAD

(SWORN to on June 11, 1969.)

Upon the foregoing Confession of Judgment, IT IS NOW, ORDERED, ADJUDGED AND DECREED that the plaintiff shall have and recover of the defendant for support of the defendant's children which are in the custody of the plaintiff the sum of One Hundred Dollars (\$100.00) per month, together with the cost of this action, beginning on the fifth day of July, 1969, and continuing on the fifth day of each and every month thereafter until the oldest child, Jennifer Marie Whitehead, shall reach the age of eighteen years or shall marry, whichever first occurs, after which time the plaintiff shall have and recover of the defendant the sum of Seventy-Five Dollars (\$75.00) on the fifth day of each and every month thereafter for support of the defendant's two remaining children, until such time as the second oldest child, Liza Ann Whitehead, shall reach the age of eighteen years or shall marry, whichever first occurs, after which time the plaintiff shall have and recover of the defendant the sum of Fifty Dollars (\$50.00) on the fifth day of each and every month thereafter for support of the defendant's remaining child, until such time as the youngest child, Shelley Suzette Whitehead, shall reach the age of eighteen years or shall marry, whichever first occurs.

It is further ORDERED that the child support payments due the plaintiff by defendant pursuant to this judgment shall be paid into the office of the Clerk of Superior Court of Edgecombe County for plaintiff's benefit.

This the 11th day of June, 1969.

s/ ROBERT C. WEAVER  
Asst. Clerk of Superior Court  
of Edgecombe County."

On 26 May 1971, after hearing on plaintiff's motion, Judge Carlton made findings of fact and entered an order in pertinent part as follows:

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"NOW THEREFORE, IT IS ORDERED AND ADJUDGED that Charles D. Whitehead is guilty as for contempt of this Court under the provisions of North Carolina General Statutes Section 5-8, by reason of his possession of the means and ability to comply with the former Court Order in this action, . . . and that such failure is wilful and impedes, impairs, and prejudices the rights of the plaintiff, and in that the defendant has failed to pay for the benefit of the plaintiff, child support in the sum of One Hundred Dollars (\$100.00) he is now in default and in arrears in the total sum of Two Thousand One Hundred Twenty-Five Dollars (\$2,125.00).

IT IS FURTHER ORDERED AND ADJUDGED that Charles D. Whitehead may purge himself of his contempt by paying into the Office of the Clerk of Superior Court of Edgecombe County for the benefit of the plaintiff, the balance of the arrears at the rate of Fifty Dollars (\$50.00) per month in addition to the current support payments in the sum of One Hundred Dollars (\$100.00) per month, such additional sum becoming payable on the 5th day of each month hereafter beginning on the 5th day of June, 1971, and continuing until such time as the total amount of arrearage shall be eliminated.

IT IS FURTHER ORDERED AND ADJUDGED that should Charles D. Whitehead fail or neglect to make any of the payments as aforesaid, or any part thereof, then and in that event, on the affidavit of the plaintiff showing such noncompliance and default on the part of the defendant, an Order of Commitment shall be issued to the Sheriff of Edgecombe County, or to the Sheriff of the County where the defendant may be found directing such Sheriff to detain the defendant in custody in the County Jail of such county until he shall have paid such portion of the support payments as shall have accrued from the date of this Judgment and remains unpaid at the time of such commitment, or until he shall have otherwise been discharged according to law."

The defendant appealed to the Court of Appeals.

*Battle, Winslow, Scott & Wiley by Charles F. Lee and Samuel S. Woodley for plaintiff appellee.*

*Bridgers & Horton by H. Vinson Bridgers and Perry Jenkins for defendant appellant.*

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HEDRICK, Judge.

[1] The defendant first contends that since his children had never been residents of the State of North Carolina the clerk of the superior court lacked jurisdiction to enter the order dated 11 June 1969 regarding their support. We do not agree.

G.S. 1-247 (now G.S. 1A-1, Rule 68.1(a)) in pertinent part provided:

"A judgment by confession may be entered for alimony or for support of minor children, and when the same shall have been entered as provided by this article, such judgment shall be binding upon the defendant, and the failure of the defendant to make any payments, as required by such judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be adjudged by the court. . . ."

Nonresidents have the right to bring an action in our courts as one of the privileges guaranteed to citizens of the several states by the Constitution of the United States, Article IV, Section 2. *Howle v. Express, Inc.*, 237 N.C. 667, 75 S.E. 2d 732 (1953); *Bank v. Appleyard*, 238 N.C. 145, 77 S.E. 2d 783 (1953); *Thomas v. Thomas*, 248 N.C. 269, 103 S.E. 2d 371 (1958).

In *Thomas v. Thomas*, *supra*, Denny, J., later C.J., quoted with approval from *Goodman v. Goodman*, 15 N.J. Misc. 716, 194 A 866, as follows:

"So far as jurisdiction over the defendant is concerned, the cause of action differs in no respect from a creditor's cause of action for collection of an ordinary debt. \* \* \*

"The common-law obligation of a man to support his wife follows him wherever he goes, and if he comes to New Jersey he is liable also for the support of his children under our statutory provisions. If this court secures jurisdiction over his person, or seizes his property located in this State, it may enforce both of these obligations against his person or his property as the case may be, whether wife or children be domiciled in New Jersey or elsewhere. . . ."

We think it is clear that having obtained *in personam* jurisdiction of the defendant, the clerk had jurisdiction to enter an

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order providing for the support of the defendant's children even though the children were nonresidents of the State.

[2] The defendant next contends that the "confession of judgment signed by the defendant, Charles D. Whitehead, was fatally defective in that the defendant failed to state the amount for which the judgment may be entered," and that the order of the assistant clerk of the superior court entered pursuant thereto is void. In *Pulley v. Pulley*, 255 N.C. 423, 121 S.E. 2d 876 (1961), the North Carolina Supreme Court held that where a husband ratifies, accepts, or acquiesces in a decree of alimony by confession, he is estopped, in absence of a showing of fraud, mistake or oppression, to challenge the validity of the judgment on the grounds of informalities or irregularities in either the confession of judgment or the decree itself.

In the present case the defendant does not contend that there was any fraud, mistake or oppression regarding the entry of the judgment dated 11 June 1969; moreover, there is evidence in the record that he ratified, accepted and acquiesced in the judgment by making payments into the office of the clerk pursuant thereto.

The record reveals that on 1 and 2 September 1970 the defendant moved in the District Court of Edgecombe County to have the order of the Clerk of Superior Court of Edgecombe County, dated 11 June 1969, vacated and set aside on the grounds that the clerk lacked jurisdiction to enter the order and that the order was void because the "Confession of Judgment" upon which it was based did not meet the requirements of G.S. 1-247, 248 and 249 (now G.S. 1A-1, Rule 68.1).

[3] On 1 March 1971, the court entered an order denying the defendant's motions, and the defendant appealed to this Court. The record on appeal was not docketed in the Court of Appeals until 16 August 1971 which is more than 150 days from the date of the order from which the defendant undertook to appeal. This appeal is dismissed for failure of the defendant to docket the record on appeal within the time prescribed by Rule 5 of the Rules of Practice in the Court of Appeals. *Church v. Cheek*, 8 N.C. App. 581, 174 S.E. 2d 650 (1970); *Osborne v. Hendrix*, 4 N.C. App. 114, 165 S.E. 2d 674 (1969).

We hold the defendant is now estopped to deny the validity of the order requiring him to support his three children at the rate of \$100.00 per month.

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**Enroughty v. Industries, Inc.**

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**[4]** That portion of the order appealed from which states:

"IT IS FURTHER ORDERED AND ADJUDGED that should Charles D. Whitehead fail or neglect to make any of the payments as aforesaid, or any part thereof, then and in that event, on the affidavit of the plaintiff showing such noncompliance and default on the part of the defendant, an Order of Commitment shall be issued to the Sheriff of Edgecombe County, or to the Sheriff of the County where the defendant may be found directing such Sheriff to detain the defendant in custody in the County Jail of such county until he shall have paid such portion of the support payments as shall have accrued from the date of this Judgment and remains unpaid at the time of such commitment, or until he shall have otherwise been discharged according to law."

is erroneous and must be stricken for it provides for the imprisonment of the defendant without notice and hearing. For the reasons stated, the order appealed from is modified and affirmed.

Modified and affirmed.

Chief Judge MALLARD and Judge GRAHAM concur.

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JOHNNY ENROUGHTY, EMPLOYEE, PLAINTIFF v. BLACK INDUSTRIES, INC., EMPLOYER, HARTFORD ACCIDENT & INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. 717IC708

(Filed 12 January 1972)

1. Master and Servant § 55—workmen's compensation—definitions of "out of" and "in the course of"

As used in the Workmen's Compensation Act, the words "out of" refer to the origin or cause of the accident, and the words "in the course of" refer to the time, place and circumstances under which it occurred.

2. Master and Servant § 55—workmen's compensation

Whether an injury arises out of or in the course of the employment is a mixed question of law and fact.

3. Master and Servant § 97—workmen's compensation—findings of fact—appellate review

The appellate court is bound by the nonjurisdictional findings of fact of the Industrial Commission, if there is competent evidence to support such findings, but is not bound by its conclusions of law.

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**Enroughty v. Industries, Inc.**

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**4. Master and Servant § 62—workmen's compensation — injuries on way to and from lunch**

The rule that traveling to and from work on a conveyance furnished by the employer is in the course of employment is applicable to trips to and from lunch.

**5. Master and Servant § 62—workmen's compensation — injury on way to lunch**

In this workmen's compensation proceeding, plaintiff's evidence was sufficient to support the Industrial Commission's determination that injuries sustained by plaintiff in a collision while riding to lunch on a truck owned by the telephone company for which defendant employer was installing underground cables and driven by the telephone company's inspector occurred by accident arising out of and in the course of his employment, where it tended to show that defendant employer furnished its employees, including plaintiff, transportation to and from the work site and to and from lunch, and that transportation on the telephone company's truck had by custom become available to defendant's employees as an alternate means of transportation when their work site was being visited by the telephone company's inspector.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission rendered on 20 May 1971.

The plaintiff offered evidence which tended to show that he was a member of a "plow crew" employed by the defendant Black Industries, Inc. (Black). This crew was engaged in burying cable for the Carolina Telephone Company (Carolina) at often isolated rural sites within a radius of 30 miles from Rocky Mount, North Carolina. It was customary for the members of the plow crew to meet in the morning at a service station in Rocky Mount where they would be picked up by their foreman (a Mr. Starling in the present case) and transported to the work site in a Black company vehicle and then returned after the day's work. The evidence indicates that this vehicle was equipped to carry several passengers.

Working at isolated sites along the highway, the men were permitted to bring their lunches from home or they frequently would ride with the foreman in the company truck to a nearby country store or cafe for lunch. If some of the men preferred to go to a nearby country store and others wished to go to a cafe, Black's truck was usually used to go to the country store and the others would ride in Carolina's truck with Mr. Sparks, Carolina's field inspector on the job, if he were present. The evidence indicates that either of these alternatives was "customary."

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On the day the accident occurred, 3 June 1969, the field inspector from Carolina, Mr. Sparks, was visiting the job site about three miles north of Nashville, North Carolina. The evidence indicates that when Mr. Sparks was at the job site at lunchtime, he frequently would invite the foreman and other members of the crew to accompany him to lunch, and this is what happened on the day in question. Black's foreman would designate the length of the lunch period, and it varied from time to time; but on 3 June 1969, the foreman specified that they were to take an hour for lunch. The plaintiff Enroughty was one of the members of the crew who chose to accompany the foreman and Mr. Sparks, in a *Carolina* truck (evidently an ordinary pick-up truck) into Nashville. Some other members of the crew took the *Black* truck and initially went to a country store for lunch. Enroughty and another Black employee, Milton Joyner, apparently were riding in the bed of the Carolina pick-up truck, which was not equipped to carry passengers except the one or two who could be accommodated in its front seat.

In or entering Nashville, the Carolina truck was involved in a collision with another vehicle, and Joyner and Enroughty were thrown from the truck. Enroughty suffered extensive head injuries which required prolonged medical attention. The driver of the other vehicle, Odell Parker Thomas, subsequently entered into an approved consent judgment and paid to the present plaintiff \$11,500. The parties to the present suit have stipulated that this amount shall be credited, after payment of attorney and medical fees, to the present defendants, should Black be found to be liable.

On appeal, the North Carolina Industrial Commission (Commission) adopted as its own the findings of fact, conclusions of law, and award previously made and filed in the case by Deputy Commissioner W. C. Delbridge. The pertinent findings of fact are as follows:

"1. Plaintiff is a white male, age 60, and was on June 3, 1969, and prior thereto, employed with the defendant employer as a flagman and general laborer. The plaintiff lives on his farm and has farmed most of his life.

2. The defendant employer does work for the Carolina Telephone Company. They dig ditches along the roadway and install telephone cables etc. Plaintiff was a member of

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the plow crew. Mr. Starling was the plaintiff's foreman. On June 3, 1969, the defendant employer was doing work for the Carolina Telephone Company and its employees were working about three miles north of Nashville installing underground telephone cables. The plaintiff was flagging traffic.

3. Around 12:00 noon on June 3, 1969, the plaintiff's foreman, Mr. Starling, told the employees of the defendant employer to knock off work and go to lunch. Mr. Sparks, a checker and employee of the Carolina Telephone Company, who was on the job to check the work progress asked Mr. Starling to go with him to lunch at a restaurant in Nashville, North Carolina. Mr. Starling informed his men that there was a country store nearby and they could take the company truck and go there for lunch if they wanted to. He also asked the plaintiff and Mr. Joyner, another employee of the defendant employer, if they wanted to go to the country store or go with him and Mr. Sparks in the Carolina Telephone pickup to Nashville and eat at the restaurant. The plaintiff and Mr. Joyner decided they would go with their foreman and Mr. Sparks to Nashville to the restaurant.

4. The plaintiff and Mr. Joyner got into the back of the Carolina Telephone pickup truck. Mr. Sparks, an employee of the Carolina Telephone Company, was driving and Mr. Starling, plaintiff's foreman, was sitting on the right front seat. As the truck driven by Mr. Sparks entered the city limits of Nashville it was struck on the right side by a third party car which ran a stop sign. Plaintiff was thrown out of the truck. His head struck the concrete sidewalk. Plaintiff received serious head injuries and was carried by ambulance to the Park View Hospital in Rocky Mount, and they immediately transferred him to Duke Hospital in Durham.

5. The defendant employer furnished transportation to its employees going to and from work. It also furnished transportation to its employees on Mr. Starling's work crew going to and from lunch. The crew plaintiff was working with were working in a rural area and they used the defendant employer's truck to go to and from lunch. Some of the defendant's employees went to the country store for

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lunch, but upon arriving they found the food inadequate and they started to Nashville in the defendant employer's pickup truck, following the pickup of the Carolina Telephone Company in which the plaintiff was riding.

6. Sometimes some of the employees of the defendant employer would carry their own lunch, but most of the time the employees would ride to lunch in the defendant employer's pickup truck. The defendant employer furnished the plaintiff transportation to and from lunch and the plaintiff at the time in question was under the control and supervision of his foreman.

\* \* \*

10. Plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer on June 3, 1969."

Based on these findings, the Deputy Commissioner and the Commission concluded that the plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer on 3 June 1969 and awarded compensation as provided in the Act.

*Battle, Winslow, Scott & Wiley, P.A., by Samuel S. Woodley and Robert L. Spencer for plaintiff appellee.*

*Teague, Johnson, Patterson, Dilthey & Clay by I. Edward Johnson for defendant appellants.*

MALLARD, Chief Judge.

The decisive question presented on this appeal is whether the evidence is sufficient to support the finding of fact numbered ten that plaintiff was injured by accident arising out of and in the course of his employment. We hold that the evidence was sufficient to support this finding of fact, the conclusion of law that the plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer, and the award entered in this case.

[11] "The basic rule is that the words 'out of' refer to the origin or cause of the accident, and that the words 'in the course of' refer to the time, place and circumstances under which it occurred." *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862 (1957). See also *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968).

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[2, 3] Whether an injury by accident arises out of or in the course of the employment is a mixed question of law and fact. *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476 (1960). This court is bound by the nonjurisdictional findings of fact of the Commission, if there is competent evidence to support such findings, but is not bound by its conclusions of law. *Priddy v. Cab Co.*, 9 N.C. App. 291, 176 S.E. 2d 26 (1970).

[4] The rule that traveling to and from work on a conveyance furnished by the employer is in the course of employment is applicable to trips to and from lunch. 1 Larson, Workmen's Compensation Law, § 15.52. See also *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 167 S.E. 2d 790 (1969).

"Injuries sustained by an employee while being transported to or from work in a conveyance furnished by his employer pursuant to an express or *implied* term of the contract of employment are compensable." (Emphasis added.) 99 C.J.S., Workmen's Compensation, § 235, p. 840. See also *Mion v. Marble & Tile Co., Inc.*, 217 N.C. 743, 9 S. E. 2d 501 (1940).

Black had a contract with Carolina to do the work in which the plaintiff was engaged. Black furnished its plow crew the means of transportation to and from the work site because their work was not at a fixed place. *Whittington v. Schnierson & Sons*, 255 N.C. 724, 122 S.E. 2d 724 (1961). It was customary for the foreman to fix the length of time for lunch and to designate where Black's truck was to take them during lunch hour, usually to a country store or a cafe chosen by the employees. It was also customary for those who did not wish to ride on Black's truck to lunch either to remain at the site of the job or to ride on Carolina's truck with Black's foreman and Carolina's inspector. On the date in question, Carolina's inspector invited Black's foreman to ride with him, and Black's foreman invited plaintiff to accompany them. If this alternate means of transportation (on Carolina's truck) was furnished by Black, the employer, then Black is liable.

[5] We hold that the evidence in this case was sufficient for the Commission to find that the transportation to lunch on the Carolina truck had become available, by custom, to Black's employees on the plow crew when the site was being visited by Carolina's inspectors (99 C.J.S., Workmen's Compensation, § 235); that the Carolina truck ride to lunch was furnished

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by Black to its employees on the plow crew under the terms of the employment; and that the plaintiff became entitled to the use of the Carolina truck at the invitation of his foreman, as an alternate means of transportation provided by his employer.

We hold, therefore, that there was sufficient competent evidence before the Commission to support its findings of fact, and that its conclusions of law and award in this case were proper. See *Hardy v. Small, supra*; *Brewer v. Trucking Co.*, 256 N.C. 175, 123 S.E. 2d 608 (1962); *Smith v. Gastonia*, 216 N.C. 517, 5 S.E. 2d 540 (1939); *Edwards v. Loving Co.*, 203 N.C. 189, 165 S.E. 356 (1932); *Dependents of Phifer v. Dairy*, 200 N.C. 65, 156 S.E. 147 (1930); *Martin v. Georgia-Pacific Corp., supra*; *Williams v. Board of Education*, 1 N.C. App. 89, 160 S.E. 2d 102 (1968); 1 Larson, Workmen's Compensation Law § 25:00.

No prejudicial error is made to appear in appellant's assignments of error, and the award of compensation herein is affirmed.

**Affirmed.**

**Judges HEDRICK and GRAHAM concur.**

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INVESTMENT PROPERTIES OF ASHEVILLE, INC., AND BAXTER  
H. TAYLOR v. MARTHA NORBURN MEAD ALLEN

No. 7128SC643

(Filed 12 January 1972)

**1. Principal and Agent § 4—proof of agency—conduct of the parties**

The appointment of an agent and the scope of his authority may be established by conduct as well as by words of the principal.

**2. Principal and Agent § 4—proof of agency—course of dealing**

Authority may be conferred upon an agent by the course of dealing between the principal and agent.

**3. Principal and Agent § 5—apparent authority**

The principal is responsible for acts of an agent within the scope of his apparent authority unless the party dealing with the agent knows he is acting in excess of his actual authority.

**4. Principal and Agent § 4—sufficiency of evidence of agency**

Plaintiffs' evidence was sufficient to be submitted to the jury on the question of whether defendant's brother was the agent of defend-

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ant in negotiating and then terminating a lease of land owned by defendant and in contracting with regard to the payment of the cost of preparing the land for a motel complex.

**5. Principal and Agent § 5—person clothed with external evidence of agency**

Even if one is not the agent of another, if the other person permits the alleged agent to clothe himself with the external evidence of agency, the principal will be bound to a third person relying on such appearance.

Judge VAUGHN dissents.

APPEAL by defendant from *Martin, Harry C., Judge*, 22 February 1971 Civil Session of BUNCOMBE Superior Court.

Plaintiffs brought this action seeking to recover \$19,456.88, the cost of preparing a parcel of land belonging to defendant for a large motel complex. They alleged: From and after 10 May 1965 plaintiffs negotiated with defendant in regard to a long term lease under which plaintiffs would prepare the land and erect a large motel complex thereon. It was agreed through defendant's brother and agent, Dr. Charles S. Norburn, that plaintiffs would prepare the land and defendant would pay for the same. The land preparation was performed and completed by Asheville Contracting Company on or about October 1, 1965; thereafter, demands for payment by Asheville Contracting Company and plaintiffs were refused by defendant whereupon plaintiffs paid Asheville Contracting Company and now defendant is indebted to plaintiffs.

In her answer defendant denied the material allegations of the complaint and further alleged: On or about 6 May 1965 defendant and the corporate plaintiff entered into a written lease agreement whereby the corporate plaintiff leased the subject land for a term of 50 years at an annual rental of \$12,000, payable \$1,000 per month, rental payments to begin "as soon as the Lessee begins to receive any income from the property or twelve (12) months from this date, whichever is sooner." Under the lease the corporate plaintiff assumed "entire responsibility for the property" and was granted "complete unrestricted control in grading, reshaping and development of the property." The lease further provided as follows: "Lessee covenants and agrees that Lessor may re-enter for default of ten days in any installment of rent or for the breach of any covenant herein contained; and further that should improvements at that time

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amount to less than Sixty Thousand dollars (\$60,000), Lessee will pay in cash to Lessor, her heirs or assigns the difference between such improvements and that amount." The first monthly rental payment under the lease was due defendant on 1 June 1966. The plaintiffs were acting as partners, co-venturers and joint venturers in the subject matter of said lease and are now indebted to defendant in the sum of \$7,000 for rental payments from June through December 1966, and the further sum of \$60,000 for breach of the lease relating to improvements. Defendant counterclaimed for \$67,000 plus interest and costs.

By reply plaintiffs alleged that the parties agreed that the lease agreement referred to in the answer would be treated as a nullity and the same was rescinded and cancelled in its entirety due to the fact that the provisions in said lease were so poorly drafted and ambiguous that they were incapable of being carried out.

Upon issues submitted the jury found that Dr. Charles Norburn was the agent of defendant in connection with the alleged termination of the lease agreement, that the lease was terminated on or before 1 June 1966; that Dr. Charles Norburn was the agent of defendant in contracting for the land preparation and that plaintiffs should recover from defendant \$19,456.88.

From judgment entered on the verdict, defendant appealed.

*Bennett, Kelly & Long by Harold K. Bennett and Hendon & Carson by George Ward Hendon for plaintiffs appellees.*

*Williams, Morris and Golding by James F. Blue III for defendant appellant.*

BRITT, Judge.

Although defendant raises several questions on appeal, the major question presented for our consideration is: Did the trial court err in denying defendant's motion for a directed verdict on the ground that plaintiffs failed to show sufficient evidence for the jury to find that Dr. Charles Norburn was acting as defendant's agent? We answer in the negative and hold that there was sufficient evidence to present a jury question.

**[1-3]** The appointment of an agent and the scope of his authority may be established by conduct as well as by words of the principal. Lee's N. C. Law of Agency and Partnership, 3rd Ed.,

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Sec. 7, p. 13. The authority of the principal given to the agent may be conferred by the course of dealing between the principal and agent. *Katzenstein v. Railroad Co.*, 84 N.C. 688 (1881). The principal is responsible for acts of the agent within the scope of his "apparent authority" unless the party dealing with the agent knows he is acting in excess of his actual authority. *Research Corporation v. Hardware Co.*, 263 N.C. 718, 140 S.E. 2d 416 (1965).

[4] The evidence in the case at hand portrayed a close business as well as personal relationship between defendant and her brother, Dr. Norburn. Defendant was quite sick during the spring and summer of 1965; she was over 75 and separated from her husband. Defendant stated that her brother had no legal interest in the land involved; that she was aware of a paper writing dated May 10, 1965 (the lease agreement) and that "[t]hey told me it was not a good lease." She was also aware of the negotiations concerning the erection of the motel complex that Dr. Norburn was conducting on her behalf and Dr. Norburn was reporting to her about the negotiations from time to time. Also, Dr. Norburn had the lease prepared that was eventually signed with the corporation that put a motel on the property, and defendant signed the lease stating at the trial that "He (Dr. Norburn) didn't tell me so much, but I knew what was going on."

The evidence further showed: Dr. Norburn was actively seeking to consummate a lease agreement on property in which he had no legal interest between defendant, the owner of the property, and Dr. Logan Robertson of the corporate plaintiff. Dr. Norburn prepared, or had prepared, a lease which was signed by defendant, but said lease was not in sufficient form to acquire financing for the anticipated motel. Further negotiations continued until an impasse was reached and the land was leased to another corporation who erected a motel on the land. During the negotiations, defendant knew of the situation generally if not as to specific details and she trusted her brother "to go ahead and do what he thought best." Dr. Norburn took defendant to see the property several times while it was being graded. Also during this time Dr. Norburn gave a written guaranty stating that he would stand personally liable for the cost of grading the land in the event a lease could not be procured.

[5] Considering all of the evidence in the light most favorable to plaintiffs, we think there was enough to submit the issue of

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agency to the jury for their consideration. Even if one is not the agent of another, if the other person permits the alleged agent to clothe himself with the ordinary external evidence of agency the principal will be bound to a third person relying upon such appearance. The principal is estopped from denying the agent's authority. *Jones v. Bank*, 214 N.C. 794, 1 S.E. 2d 135 (1939).

We have carefully considered the other assignments of error brought forward and argued in defendant's brief but conclude that no error, properly assigned, is sufficient to justify a new trial.

No error.

Judge BROCK concurs.

Judge VAUGHN dissents.

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INVESTMENT PROPERTIES OF ASHEVILLE, INC., AND BAXTER  
H. TAYLOR v. CHARLES S. NORBURN

No. 7128SC642

(Filed 12 January 1972)

APPEAL by plaintiff from *Martin, Harry C.*, Judge, 22 February 1971 Session of Superior Court held in BUNCOMBE County.

Plaintiffs brought this action seeking to recover \$19,456.88, the cost of grading and preparing a parcel of land belonging to Martha Norburn Mead Allen, defendant's sister, for construction of a large motel complex. Plaintiffs alleged: From and after 10 May 1965 plaintiffs negotiated with defendant, as agent for his sister, in regard to a long term lease under which plaintiffs would prepare the land and erect a large motel complex. Defendant executed a guaranty agreement whereby he guaranteed to plaintiffs that he would be personally liable for the costs of preparing the land if the lease agreement was not consummated and his sister did not pay the costs of preparing the land. The land preparation was performed and completed by Asheville Contracting Company; Martha Norburn Mead Allen refused to pay, whereupon plaintiffs paid Asheville Contracting Company and defendant is now obligated to plaintiffs on his guaranty agreement.

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Plaintiffs instituted a separate action against Martha Norburn Mead Allen to recover the \$19,456.88 costs of preparing the land. In the action against her, they alleged her primary obligation to pay.

The two cases were consolidated for trial and resulted in a verdict against Martha Norburn Mead Allen in the sum of \$19,456.88 in the action against her; and resulted in a dismissal of this action against Charles S. Norburn upon a verdict of the jury finding there was no consideration for defendant's guaranty agreement.

Martha Norburn Mead Allen has appealed from the verdict and judgment adverse to her, and an opinion by Judge Britt finding no error in her trial is being filed contemporaneously with the filing of this opinion.

*Bennett, Kelly & Long, by Harold K. Bennett, and Hendon & Carson, by George Ward Hendon, for plaintiffs.*

*Williams, Morris & Golding, by James F. Blue III, for defendant.*

BROCK, Judge.

We have given careful consideration to all of the assignments of error and arguments brought forward by plaintiff but we are impelled to the conclusion that the judgment should be affirmed. In our opinion the case was properly submitted to the jury upon applicable principles of law and that no error has been made to appear which would justify a new trial.

No error.

Judge BRITT concurs.

Judge VAUGHN dissents.

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**Lehrer v. Manufacturing Co.**

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IRVING LEHRER v. EDGECOMBE MANUFACTURING COMPANY,  
INC., AND DOBIE ORIGINALS, INC.

No. 717SC646

(Filed 12 January 1972)

**1. Rules of Civil Procedure § 7—motions—failure to state rule number**

The trial judge should have declined to rule upon motions which did not contain the rule number under which the movant was proceeding. Rule 6 of the General Rules of Practice for the Superior and District Courts

**2. Abatement and Revival § 3—pendency of action in federal court of another state**

The pendency of a prior action between the same parties for the same cause of action in a federal district court of another state is not a sufficient ground for dismissal of an action in a court of this State.

**APPEAL** by plaintiff from *Tillery, Judge*, 17 May 1971 Session of Superior Court held in EDGECOMBE County.

Plaintiff instituted this action on 3 September 1970 in Edgecombe County, North Carolina, and alleged in his complaint that early in 1969, he had contracted with Dobie Originals, Inc. (Dobie), a New York corporation, to come to North Carolina and supervise the construction of and then manage a garment manufacturing plant in Tarboro, North Carolina. Plaintiff did so and later entered into a contract with Edgecombe Manufacturing Company, Inc. (Edgecombe), a subsidiary corporation of Dobie, to manage the newly constructed plant. On 14 August 1969, an official of Dobie asked him to resign as manager of Edgecombe, which he agreed to do and did, under certain conditions. Plaintiff alleged that both Dobie and Edgecombe breached their contracts with him, and he seeks to recover damages for the breaches.

Edgecombe denied the material allegations of the complaint and pleaded a release from plaintiff as a bar to any right to recover against it.

Dobie denied the material allegations of the complaint and for a further answer and defense asserted that on 10 November 1969, the plaintiff had instituted (and there was then pending) an action against it in the United States District Court for the Southern District of New York, in which he had alleged

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substantially the same cause of action as he had in the complaint filed in Edgecombe County.

On 29 October 1970, Dobie filed a motion in which it asked that the action against it be dismissed due to the pendency of the prior action in the United States District Court in New York, and on the same date filed another motion asking that the cause be dismissed because Dobie had no interest in the employment contract between the plaintiff and Edgecombe.

On 17 May 1971, Judge Tillery, after a hearing, entered the following order:

"This cause coming on for hearing before the undersigned Judge of Superior Court at the May 17, 1971 Term of Edgecombe County, and the Court having heard oral arguments and having studied the pleadings, finds as a fact that there is now pending in the United States District Court for the Southern District of New York an action entitled, '*Irving Lehrer vs. Dobie Originals, Inc.*' and bearing the file number Civil Action File No. 4870-1969, and that said prior pending action has been pleaded in bar in this action, and that this action and the action pending in New York are on substantially the same subject matter and that all material questions and rights affecting the plaintiff and Dobie Originals, Inc., may be determined in the prior pending action.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this action, as to the defendant Dobie Originals, Inc., be and the same is dismissed."

Plaintiff excepted to the entry of the foregoing order and appealed to the Court of Appeals.

*Biggs, Meadows & Batts by Charles B. Winberry for plaintiff appellants.*

*Bridgers & Horton by T. Perry Jenkins for defendant appellees.*

MALLARD, Chief Judge.

[1] Neither of the motions filed by Dobie contained the rule number under which the movant was proceeding. The trial judge should have declined to rule upon the motions because they did

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not comply with Rule 6 of the "General Rules of Practice for the Superior and District Courts" as contained in Volume 276, page 735, of the North Carolina Reports. However, since plaintiff has not argued this failure, we consider the appeal on its merits.

[2] The appeal presents this question for decision: Is the pendency of a prior action by the plaintiff against the defendant Dobie in a United States District Court in New York, assuming that the subject matter, issues involved, and relief demanded are substantially the same as in this action, sufficient grounds for a dismissal of this action? The answer is: No.

Prior to the adoption of the new Rules of Civil Procedure as contained in Chapter 1A of the General Statutes, the proper way to raise a plea in abatement was by answer. Under G.S. 1A-1, Rule 7(c), "pleas" are specifically abolished; but under Rule 12(b), every defense, including a defense in the nature of the old plea in abatement, may be raised by responsive pleading—in this case by answer. Both the plaintiff and the defendants in the case before us agree that the dismissal presents essentially the same questions as did the old plea of abatement.

The rule is stated as follows:

"The pendency of a prior action between the same parties for the same cause of action in a state court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of this state having jurisdiction. The prior action must be pending in a court of this state, and the pendency of an action in a court of another state will not support a plea in abatement. \* \* \*" 1 Strong, N. C. Index 2d, Abatement and Revival, § 3.

It is said in *In re Skipper*, 261 N.C. 592, 135 S.E. 2d 671 (1964):

"A plea in abatement seeking dismissal of an action, because another action is pending between the same parties on the same right of action, should be sustained when, *and only when*, the actions are pending in *different courts of the same sovereign*. If the actions are brought in courts of *different states*, the plea should be overruled." (Emphasis added.)

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In *Cushing v. Cushing*, 263 N.C. 181, 139 S.E. 2d 217 (1964), it is said:

“Where another action pending between the same parties for the same cause is made the basis of a plea in abatement, the former action must be pending (a) *in a court of competent jurisdiction* and (b) *within this State*, in order to bar the second action. *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S.E. 2d 860; 1 McIntosh, North Carolina Practice and Procedure, § 1236(4) (1956 ed.).” (Emphasis original.)

In *Cushing*, the plea in abatement failed for both of the reasons indicated above. In both *Cushing* and *In re Skipper*, the prior actions were pending in the courts in another state.

In *Kesterson v. R.R.*, 146 N.C. 276, 59 S.E. 871 (1907), however, the prior action was pending in a federal court, and the rule was explained as follows:

“The pendency of a suit, *in personam*, in a State court, which has not proceeded to judgment, cannot be successfully pleaded in abatement of a suit between the same parties for the same cause of action in a Federal court.

So, too, and for like reasons, an action of a similar nature which is pending, but has not proceeded to judgment, in a Federal Court, cannot be pleaded in abatement of a like suit in a State court. \* \* \*

Had the action in the Circuit Court of the United States been prosecuted to judgment, it would have, upon proper plea, barred further prosecution in the State courts. \* \* \*

Defendants herein would distinguish *Kesterson* on the grounds that the action pending in the Federal Circuit Court in that case had been nonsuited prior to the filing of the complaint in the state action, but the general principles stated in *Kesterson* and reiterated in every other North Carolina case found are to the effect that a similar action pending in the courts of any other jurisdiction will not abate an action between the same parties in the North Carolina courts. Apparently recognizing that the North Carolina rule is against their position, the defendant appellees in this case ask that the Court of Appeals “overrule” *Cushing* and *Skipper*. We do not have the authority or

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inclination to do so. Therefore, we hold that the trial judge erred in granting Dobie's motion to dismiss on the grounds of a prior pending action in another jurisdiction.

In Anno., 19 A.L.R. 2d 301, it is noted that it is "uniformly held" that a prior action pending outside the jurisdiction is not grounds for the abatement of an action begun in the courts of the state in question, but that this does not preclude the court in the second forum from *staying* or *continuing* the progress of the second action pending determination of the first. Such a stay or continuance is, however, discretionary and not a matter of right.

In the case before us, the defendant Dobie asserted its defense of the prior pending action in the answer, as well as in a separate written motion filed in the case. The separate motion may be treated as surplusage because the defense of the prior pending action contained in the answer should be considered first, as preliminary to a hearing on the merits.

For the reasons hereinabove stated, the order dismissing this action as to Dobie is reversed.

Reversed.

Judges HEDRICK and GRAHAM concur.

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RONALD DALE RIDDICK, ADMINISTRATOR OF THE ESTATE OF PATRICIA  
RHEA RIDDICK v. BARRY KEITH WHITAKER AND ALMA  
LANDING WHITAKER

No. 716SC591

(Filed 12 January 1972)

**1. Rules of Civil Procedure § 50—motion for directed verdict — consideration of evidence**

When motion for directed verdict is made at the conclusion of the evidence, the trial court must determine whether the evidence, taken in the light most favorable to the plaintiff and giving the plaintiff the benefit of every reasonable inference, is sufficient.

**2. Rules of Civil Procedure § 50—directed verdict — contributory negligence of plaintiff**

A directed verdict on the ground that plaintiff's evidence reveals contributory negligence as a matter of law is proper only when contributory negligence is so clearly established that no other conclusion can reasonably be reached.

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**3. Automobiles § 80—making U-turn on highway—contributory negligence**

Plaintiff's evidence established his decedent's contributory negligence as a matter of law, where the evidence, viewed in the light most favorable to the plaintiff, tended to show that the decedent attempted to make a U-turn on a narrow highway in the nighttime and thereby blocked both lanes of travel to oncoming traffic.

APPEAL by plaintiff and defendants from *Cowper, Judge*, April 20, 1971 Session of HERTFORD Superior Court.

This is a civil action asking damages for the alleged wrongful death of plaintiff's intestate, who was 19 years old. Alma Landing Whitaker was the owner of the automobile driven by Barry Whitaker as her agent, and this automobile was in collision with an automobile driven by decedent and owned by her husband.

At the trial plaintiff's evidence tended to show that the decedent, together with her husband and another couple, were at a restaurant in Williamston on the night of 16 August 1970. The defendant, Barry Whitaker, and his wife, were also at the restaurant. At about 11:30 p.m., all of them left the restaurant to go to the Riddick residence in Ahoskie. The two men were in the rear seat and the two women in the front seat of the Riddick car. Barry Whitaker and his wife were to follow in the Whitaker car. Decedent began driving north on Highway 13, and after driving some distance, it was noticed that Whitaker's automobile was not in sight. Decedent pulled the automobile off the road on the right-hand side and waited. After a minute or so it was decided that they should go back to see if Whitaker had had some trouble. Decedent started to turn around on the open highway in the nighttime. She pulled the automobile across the road with the front wheels off the left-hand side of the road almost in the ditch. As she put the automobile in reverse gear, it stalled. The headlights of Whitaker's automobile appeared around a turn at this time. Decedent started the automobile and backed up to complete her turn. The left rear wheel of the Riddick automobile was on or near the center line of the highway, and before the turn could be completed, Whitaker's automobile collided with it. Plaintiff's intestate died as a result of the collision.

There was evidence that Whitaker had been drinking on the night of the accident and that he had been driving at ap-

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proximately 75 to 80 miles per hour immediately prior to the collision.

The defendants moved for a directed verdict at the close of plaintiff's evidence. The motion was denied.

Defendants put on no evidence and again moved for a directed verdict which was denied.

The jury found in favor of the plaintiff and awarded damages in the amount of \$1,500. The defendants moved for a judgment notwithstanding the verdict and it was denied.

The plaintiff moved to set the verdict aside for inadequate damages. The motion was denied. The plaintiff moved for a new trial on the issues of damages. This motion was denied.

Judgment was entered on the verdict. Both the plaintiff and the defendants appeal.

*Cherry, Cherry and Flythe by Joseph J. Flythe for plaintiff appellant and plaintiff appellee.*

*Jones, Jones & Jones by L. Bennett Gram, Jr., for defendants appellant and defendants appellee.*

CAMPBELL, Judge.

The plaintiff has brought two questions to this Court. Our decision on defendants' appeal makes it unnecessary to consider the questions raised by plaintiff.

The defendants raise the following question on appeal:

1. Did the trial court commit error in denying defendants' motion for directed verdict and judgment notwithstanding the verdict?

[1, 2] When a motion for directed verdict is made at the conclusion of the evidence, the trial court must determine whether the evidence, taken in the light most favorable to the plaintiff and giving the plaintiff the benefit of every reasonable inference, is sufficient. *Sawyer v. Shackleford*, 8 N.C. App. 631, 175 S.E. 2d 305 (1970). In the instant case defendants concede their negligence but say that plaintiff's evidence reveals contributory negligence as a matter of law. On such a contention, a directed verdict is proper only when contributory negligence is so clearly established that no other conclusion can reasonably

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be reached. *Atkins v. Transportation Co.*, 224 N.C. 688, 32 S.E. 2d 209 (1944).

[3] Viewed in the light most favorable to the plaintiff, the evidence shows that decedent attempted to make a turn on a highway, in the nighttime, at approximately 12:30 a.m. When she began the turn, no headlights or other automobiles were visible. The road was only 21 feet wide and of insufficient width to permit a U-turn. She pulled the automobile across the road as far as possible to the west side without going into the ditch. At that point the automobile stalled. One of the occupants of the rear seat testified that when the automobile stalled, he saw headlights rounding the curve from the south. Decedent restarted the automobile and backed east across the road until the left rear wheel was on the center line. Thus both lanes of travel on this two-lane road were effectively blocked. Decedent either saw the oncoming vehicle and ignored it or failed to see what she should have seen. At any rate she blocked the highway with her car crossways of the highway.

Plaintiff's evidence establishes decedent's contributory negligence as a matter of law. No other inference could reasonably be drawn from the facts in this case. *Clayton v. Rimmer*, 262 N.C. 302, 136 S.E. 2d 562 (1964). *Whitley v. Harding*, 10 N.C. App. 282, 178 S.E. 2d 139 (1970).

It is not necessary to consider the questions raised by plaintiff's appeal.

The defendants, after denial of their motion for directed verdict, moved in apt time for judgment notwithstanding the verdict. The motion should have been allowed.

Reversed.

Judges MORRIS and PARKER concur.

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**State v. Osborne and State v. Lowery**

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STATE OF NORTH CAROLINA v. THOMAS OSBORNE  
— AND —  
STATE OF NORTH CAROLINA v. DANIEL LOWERY, JR.  
No. 7126SC724

(Filed 12 January 1972)

**1. Robbery § 4—armed robbery—sufficiency of evidence**

The State's evidence was sufficient to go to the jury against both defendants in this armed robbery prosecution where it tended to show that one defendant pulled a knife on the victim, that the second defendant put his hand in his own pocket and threatened to get his gun, and that the second defendant reached in the victim's pocket and removed 90 cents in change.

**2. Robbery § 1—common law robbery defined**

Robbery at common law is the felonious taking of money or goods of another, or in his presence, against his will, by violence or putting him in fear.

**3. Robbery § 1—use of firearms in robbery—punishment—G.S. 14-87**

G.S. 14-87 creates no new offense but provides for a more severe punishment when firearms or other dangerous weapons are used in the commission of a robbery.

**4. Robbery § 1—use of dangerous weapon—difference between common law and armed robbery**

Where a weapon which is dangerous within the meaning of G.S. 14-87 is used in a robbery, the only difference between common law robbery and armed robbery as provided by G.S. 14-87 is whether the life of the victim is endangered or threatened.

**5. Robbery § 5—instructions—failure to distinguish between armed and common law robbery**

Defendants in an armed robbery prosecution are entitled to a new trial for failure of the trial court in its instructions to make a sufficient distinction between the offenses of robbery with a dangerous weapon and common law robbery.

APPEAL by defendants from *McLean, Judge*, 24 May 1971 Session of MECKLENBURG Superior Court.

Defendants were tried on separate bills of indictment for the armed robbery of Herbert Junior Alexander (Alexander). The cases were consolidated for trial.

The State's evidence tended to show: On 2 April 1971 between 5:00 p.m. and 5:30 p.m., the prosecuting witness, Alexander, was unloading his truck at Puckett's Super Market in Charlotte. One of the defendants came by, picked up some empty

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racks that Alexander was to carry away and dropped them. The defendants then restacked the racks, Alexander thanked them, but Lowery told him, "We can't live on 'thank you.' That will cost you a yard." (A yard is slang term for \$1.00.) Alexander then stated that he did not have \$1.00, but only some change with which to eat. He turned around and heard something pop. Lowery, standing about three feet from him, had a knife in his right hand with the blade open. Osborne was standing to Lowery's right with his hand in his pocket and stated, "Let me get my gun." Alexander stated he was in fear of his life when he saw the knife. Lowery then put his hand in Alexander's pocket and got about 90 cents in change. The knife was still visible. Defendants stood there and counted the money. They took the money against the will and without the consent of Alexander.

Defendants offered evidence tending to show: Alexander promised to pay them \$1.00 for helping him with the merchandise and he only gave them 90 cents, stating that was all the money he had. An argument ensued and they cursed Alexander and he cursed them. Both defendants denied robbing the prosecuting witness.

Defendants were found guilty of armed robbery as charged, a violation of G.S. 14-87, and each was sentenced to prison for 25 years. From judgment imposing said sentences, defendants appealed.

*Attorney General Robert Morgan by Assistant Attorney General Claude W. Harris for the State.*

*W. J. Chandler, Jr., for the defendant appellants.*

BRITT, Judge.

Defendants assign as error the denial of their motions to dismiss at the close of all the evidence. In *State v. Cutler*, 271 N.C. 379, 382, 156 S.E. 2d 679, 681 (1967), the court held:

Upon a motion for judgment as of nonsuit in a criminal action, the evidence must be considered by the court in the light most favorable to the State, all contradictions and discrepancies therein must be resolved in its favor and it must be given the benefit of every reasonable inference to be drawn from the evidence. *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169; *State v. Thompson*, 256 N.C. 593, 124 S.E.

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2d 728; *State v. Bass*, 255 N.C. 42, 120 S.E. 2d 580. All of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion. *State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833; *State v. Virgil*, 263 N.C. 73, 138 S.E. 2d 777.

[1] The evidence presented in this case when considered in that light indicates that defendants were acting in concert; that Lowery, while standing three feet from Alexander with Osborne at his side, pulled a knife; that Osborne put his hand in his own pocket and threatened to get his gun; that Lowery reached in Alexander's pocket and removed 90 cents in change; and that the prosecuting witness was in fear for his life. We hold that there was sufficient evidence to withstand the motion for non-suit and the assignment of error is without merit.

Defendants assign as error that portion of the jury charge in which the court instructed as to common law robbery. Defendants contend that in its instructions the court made no proper distinction between the statutory offense of robbery with a dangerous weapon (G.S. 14-87) and common law robbery; that since the instructions on the two offenses were almost the same, the jury was confused and possibly returned a verdict of guilty as charged rather than common law robbery as they could make no distinction in the offenses.

[2, 3] Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *State v. Lawrence*, 262 N.C. 162, 163, 136 S.E. 2d 595, 597 (1964). G.S. 14-87 creates no new offense; it does not add to or subtract from the common law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission of the offense as set forth in the statute, more severe punishment may be imposed. *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966).

[4, 5] In reality, where a weapon which is dangerous within the meaning of G.S. 14-87 is used in a robbery, the only difference between common law robbery and armed robbery as provided by G.S. 14-87 is whether the life of the person robbed is endangered or threatened by the weapon. While the distinction

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is small, the difference in punishment can be considerable. A careful review of the instructions in the case at bar impels us to conclude that under the facts presented in this case the able trial judge did not make a sufficient distinction between armed robbery and common law robbery. For that reason, defendants are entitled to a new trial.

Although the sufficiency of the bill of indictment against defendant Osborne has not been challenged, and we do not pass upon the question, prior to a retrial of the cases the solicitor might be well advised to give the bill his careful consideration.

New trial.

Judges BROCK and VAUGHN concur.

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STATE OF NORTH CAROLINA v. MELVIN DOUGLAS WILLIAMS, JR.

No. 7126SC729

(Filed 12 January 1972)

**1. Criminal Law § 155.5— failure to docket record on appeal in apt time**

Although the trial court extended the time for defendant to serve the case on appeal, the appeal is subject to dismissal where the record on appeal was not docketed within 90 days from the date of the judgment appealed from and the trial court did not extend the time for docketing the record on appeal.

**2. Searches and Seizures § 3— warrant to search for narcotics — validity**

Warrant to search for narcotics and the attached affidavit were in substantial compliance with statutory and constitutional requirements. G.S. 15-26.

**3. Criminal Law § 71— shorthand statement of fact**

Testimony by police officers that they went to defendant's "residence" to execute a search warrant was competent as a shorthand statement of fact.

**4. Criminal Law § 75— discovery of heroin — defendant's statement "That's all."**

The trial court did not err in the admission of testimony that after heroin had been discovered in a search of his apartment, defendant stated, "That's all. There's not anymore," where the statement did not result from interrogation by officers and the evidence supports the trial court's determination that the statement was made freely, understandingly and voluntarily.

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**5. Criminal Law § 50; Narcotics § 3—expert testimony — identification of heroin — chain of possession of the evidence**

The trial court properly allowed a chemist to give his opinion that two glassine bags found in defendant's apartment contained heroin where the record discloses that the bags were in the possession of the police department at all times prior to the time the white powder contained in the bags was analyzed by the chemist.

APPEAL by defendant from *Beal, Judge*, 14 June 1971 Session of Superior Court held in MECKLENBURG County.

The defendant Melvin Douglas Williams, Jr., was charged in a bill of indictment, proper in form, with the possession of a narcotic drug; to wit, heroin, a felony, in violation of G.S. 90-88. Upon the defendant's plea of not guilty, the State offered evidence tending to show the following: On 16 October 1970, at about 7:00 a.m., several officers from the Charlotte, North Carolina, Police Department, armed with a search warrant, went to the residence of the defendant Melvin Douglas Williams, Jr., at 2612 Pitts Drive, Apartment C, in the City of Charlotte, where they knocked on the door and were admitted by a small child. Officer Correll proceeded upstairs in the apartment where he found the defendant standing nude in the bathroom preparing to shave. After the search warrant had been read to the defendant, the officers searched the apartment. In the bedroom to the right of the bathroom one of the officers found a brown paper bag containing ten packages. Each package contained fifteen small cellophane bags, each of which contained white powder. The "white powdery substance" from two of the bags was analyzed and found to contain the narcotic drug heroin. The defendant offered no evidence. The jury found the defendant guilty as charged, and from a judgment of imprisonment of five years, the defendant appealed.

*Attorney General Robert Morgan and Associate Attorney Edwin M. Speas, Jr., for the State.*

*Scarborough, Haywood & Selvey by J. Marshall Haywood for defendant appellant.*

HEDRICK, Judge.

[1] The record reveals that the judgment in this case was entered on 17 June 1971. The record on appeal was docketed in the Court of Appeals on 27 September 1971, which was more

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than ninety days from the date of the judgment appealed from. Although the record discloses that the court extended the time for the defendant to prepare and serve the case on appeal, and for the State to serve exceptions or counter case, there is nothing in the record indicating an extension of time to docket the record on appeal in the Court of Appeals. Therefore, the appeal is subject to dismissal for the defendant's failure to comply with Rule 5 of the Rules of Practice in the Court of Appeals. However, the appeal is not dismissed, and we consider all the defendant's assignments of error brought forward and argued in his brief.

[2] The defendant's contention that the court erred in denying his motion to suppress the evidence obtained as a result of the search of the defendant's apartment because the search warrant was invalid is without merit. We hold the search warrant and the attached affidavit are in substantial compliance with statutory and constitutional requirements. *G.S. 15-26; Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964); *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *State v. Flowers*, 12 N.C. App. 487, 183 S.E. 2d 820 (1971), *cert. denied* 7 Dec. 1971; *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

[3] The court did not err in allowing Officers Correll and Stroud to testify that they went to the defendant's "residence." Although the word "residence" is in the nature of a conclusion, it is competent as a shorthand statement of fact describing where the officers went to execute the search warrant. *State v. Nichols*, 268 N.C. 152, 150 S.E. 2d 21 (1966); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

[4] It was not prejudicial error for the court to allow the State's witnesses to testify that the defendant stated after the search and after his arrest, "That's all. There's not anymore," or there "Ain't anymore." The record reveals the statement was made by the defendant voluntarily and not as a result of any interrogation by the officers; moreover, there is evidence in the record supporting the court's finding and conclusion that the statement was made freely, understandingly and voluntarily.

[5] The court properly allowed the chemist to testify that in his opinion two of the glassine bags found in the defendant's apartment contained heroin, since the record clearly discloses

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**Younts v. Insurance Co.**

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that the bags containing the white powder found in the defendant's apartment were in the possession of the Charlotte Police Department at all times prior to the time that the white powder contained in the bags was analyzed by the chemist. *State v. Preston*, 9 N.C. App. 71, 175 S.E. 2d 705 (1970).

There was ample evidence to require the submission of this case to the jury, and the court's instructions to the jury were fair and adequate and free from prejudicial error.

The defendant had a fair trial in the superior court free from prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

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**MILDRED A. YOUNTS v. STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY**

No. 7119SC492

(Filed 12 January 1972)

**Insurance §§ 82, 105—unsatisfied judgment—action against automobile liability insurer—proof of ownership of vehicle involved in collision**

In an action against an automobile liability insurer to recover upon a judgment obtained against a motorist allegedly insured by defendant as the named insured of an owned vehicle, wherein defendant insurer alleged it was not liable on the ground that the negligent motorist was not the owner of the 1953 Oldsmobile involved in the collision with plaintiff and had no insurable interest therein, the trial court did not err in the exclusion of testimony by plaintiff's witness that he had at one time owned a 1953 Oldsmobile, that he sold it to another, that the vehicle was repossessed by a bank and that the bank sold it to the negligent motorist, plaintiff not having laid the proper foundation to show the need of an explanation of the transaction, and the witness not having identified the vehicle as the one described in defendant's contract of insurance.

Judge VAUGHN dissents.

**APPEAL** by plaintiff from *Beal, Judge*, 4 January 1971 Session of Superior Court held in RANDOLPH County.

Plaintiff seeks to recover upon a \$6,500.00 judgment which she obtained against one Donald Joe Myers (Myers).

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Plaintiff's complaint undertakes to allege, in the alternative, six causes of action. However, on this appeal plaintiff argues to sustain only the cause of action based upon Myers' operation of a 1953 Oldsmobile as the named insured of an owned vehicle.

Plaintiff's allegations may be summarized as follows: That on 1 June 1962 defendant issued to Myers a policy of insurance providing coverage to Myers for liability arising from his (Myers') operation of the 1953 Oldsmobile as an owned vehicle; that on 3 November 1962, while said policy was in force, Myers' negligent operation of his 1953 Oldsmobile caused damage to plaintiff; that plaintiff sued Myers and recovered judgment for \$6,500.00; and that the judgment has not been paid.

Defendant in its answer admitted the issuance of the policy identified in the complaint, but denied that Myers was the owner of the 1953 Oldsmobile, and further alleged that it was not liable because Myers had no insurable interest in the 1953 Oldsmobile.

The trial judge would not allow plaintiff to introduce parol evidence tending to show the execution and delivery of a North Carolina Department of Motor Vehicles title certificate for a 1953 Oldsmobile to Myers in May or June 1962. At the close of plaintiff's evidence, defendant's motion for a direct verdict was allowed. Plaintiff appealed.

*John Randolph Ingram for plaintiff.*

*Edwin T. Pullen for defendant.*

BROCK, Judge.

Plaintiff did not undertake to offer into evidence a certified copy of the motor vehicle title certificate to establish ownership of the 1953 Oldsmobile by Myers. Therefore, according to this record, it is not known in whose name the vehicle was registered. If it was registered in Myers' name, obviously it should have been introduced as an idicia of ownership. If it was not registered in Myers' name, it should have been introduced to show that it was not and thereby establish grounds for explanatory evidence.

At the final pre-trial conference, plaintiff announced that Donald Joe Myers and Mrs. Donald Joe Myers were witnesses,

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and stipulated that all witnesses were available and that the case was ready for trial. However, plaintiff did not call Myers or Myers' wife as a witness to testify about a purchase of the 1953 Oldsmobile or the location of the title certificate therefor.

The only evidence offered by plaintiff concerning ownership of the 1953 Oldsmobile was the testimony of one Billy Joe Wright. Wright undertook to testify that he owned the 1953 Oldsmobile at one time; that he sold it to one Arthur Lee Charles; that it was financed for Charles by Lexington State Bank; that Lexington State Bank repossessed the car from Charles; and that Lexington State Bank sold the car to Myers. This testimony was not allowed before the jury, and this exclusion of evidence by the trial judge constituted the crux of plaintiff's appeal.

We think the trial judge was correct in excluding the tendered evidence. Plaintiff may have been able to make the evidence competent by laying the proper foundation which showed the need of an explanation of the transaction, but she has not done so. As noted above, so far as this record discloses the vehicle was registered in Myers' name with the Department of Motor Vehicles and no such explanation was necessary. Additionally, we note that the tendered testimony does not sufficiently identify the vehicle described by the witness as the vehicle described in defendant's contract of insurance.

We do not wish to be understood as holding that the only way to prove ownership of a motor vehicle is by a certificate of title which has been properly registered with the Department of Motor Vehicles. An innocent third party should not be required to suffer merely because the purchaser of a motor vehicle may have failed to comply with the provisions of G.S. 20-72. However, as in most instances, plaintiff had the burden of proof and we hold that she failed to carry her burden sufficiently to submit the case to the jury.

Affirmed.

Judge GRAHAM concurs.

Judge VAUGHN dissents.

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**Sales Co. v. Plywood Distributors**

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CLEAR FIR SALES COMPANY, A DIVISION OF FIBREBOARD CORPORATION v. CAROLINA PLYWOOD DISTRIBUTORS, INC., AND STANLEY N. PATELOS

No. 718SC565

(Filed 12 January 1972)

**1. Rules of Civil Procedure § 56—summary judgment—question presented**

It is not the duty of the court hearing a motion for summary judgment to decide an issue of fact, but rather to determine whether a genuine issue as to any material fact exists.

**2. Rules of Civil Procedure § 56—summary judgment—availability to a claimant**

Summary judgment is available to a claimant as well as to a defendant. G.S. 1A-1, Rule 56(a) and (c).

**3. Guaranty—what constitutes a guaranty**

The president of the corporate defendant wrote the following letter to the plaintiff: "Please accept this letter as my personal guaranty for the purchases of [the corporation] through December 31, 1970. If we are continuing to do business at that time we will be glad to renew this guaranty." *Held*: The letter constitutes a guaranty as a matter of law, not an offer of guaranty, and the words "please accept" are nothing more than words of courtesy.

APPEAL by defendant Patelos from *Blount, Judge*, 3 May 1971 Session of Superior Court held in WAYNE County.

Appeal is from summary judgment against the individual defendant, Stanley N. Patelos, for a sum of money owed plaintiff for building materials sold to corporate defendant on 16 February 1970. Patelos, President of corporate defendant, allegedly guaranteed payment for the purchases in a letter to plaintiff, dated 10 December 1969. The letter provides in pertinent part:

"Please accept this letter as my personal guarantee for the purchases of Carolina Plywood Distributors through December 31, 1970. If we are continuing to do business at that time we will be glad to renew this guarantee."

*Maupin, Taylor & Ellis by Charles B. Neely, Jr., for plaintiff appellee.*

*Baddour and Lancaster by H. Martin Lancaster for defendant appellant.*

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GRAHAM, Judge.

[1, 2] It is not the duty of the court hearing a motion for summary judgment to decide an issue of fact, but rather to determine whether a genuine issue as to any material fact exists. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823. Summary judgment is available to a claimant as well as to a defendant, G.S. 1A-1, Rule 56(a), and it must be rendered forthwith upon his motion if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that claimant is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(c).

[3] The corporate defendant did not file answer and its indebtedness to plaintiff is conceded by appellant Patelos. Appellant also concedes that he wrote the letter of 10 December 1969. He contends, however, that the letter constitutes only an offer to enter a contract of guaranty, as distinguished from an absolute guaranty, and that an issue of fact exists as to whether the offer was accepted by plaintiff. He also says that if the language of the letter does not clearly show that it was intended only as an offer, its meaning is ambiguous and should be resolved by the jury.

"Where the language of a contract is plain and unambiguous the construction of the agreement is a matter of law for the court. . . . However, if the contract terms are ambiguous, extrinsic evidence relating to the agreement may be competent to clarify its terms, and to have its meaning ascertained by the jury under proper instructions by the court." 2 Strong, N.C. Index 2d, Contracts, § 12, p. 311.

The only suggestion of ambiguity by appellant is that the words "[p]lease accept" raise a question as to whether the letter was intended to be effective as a guaranty only if appellant was given notice of its acceptance as such. These words, as used in the letter, are nothing more than words of courtesy. At most they represent an expression of hope that the guaranty will be regarded by plaintiff as reliable security upon which to base future credit sales to appellant's company.

The language of the letter must be given such construction as appellant, at the time it was written, should have supposed plaintiff would give to it, or as plaintiff was fairly justified in

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giving to it. *Koppers Co., Inc. v. Chemical Corp.*, 9 N.C. App. 118, 175 S.E. 2d 761. It would be a strained construction to hold that the words "[p]lease accept this letter as my personal guaranty" indicate an intention on the part of appellant that the guaranty was to be binding only if notice was communicated by plaintiff that it was accepted. Indeed, the letter itself indicates the writer regarded it as a guaranty, rather than an offer of guaranty, in that it states "[i]f we are continuing to do business at that time we will be glad to renew *this guaranty*." (Emphasis added.)

We are of the opinion and so hold that the language of the letter is plain and unambiguous and that its effect is a question of law for the court. We further hold that it constitutes an absolute promise by appellant to pay for purchases made by the corporate defendant and that no communication of acceptance was necessary. "'A guaranty is deemed to be absolute unless its terms import some condition precedent to the liability of the guarantor. In order to bind the guarantor under an absolute guaranty it is not necessary that there should be notice of acceptance of the guaranty. . . .'" *Trust Co. v. Godwin*, 190 N.C. 512, 519, 130 S.E. 323, 327.

The trial court correctly determined that there is no genuine issue as to any material fact. Summary judgment for plaintiff was proper.

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. MICHAEL CLARK KISTLER

No. 7110SC713

(Filed 12 January 1972)

**1. Narcotics § 3; Criminal Law § 42—possession of marijuana — competency of evidence — money order receipt**

In a prosecution charging defendant with the felonious possession of marijuana, it was not prejudicial to admit in evidence a receipt for a telegraph money order from defendant to an address in California, there also being evidence that a package of marijuana was mailed to defendant from the address in California.

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State v. Kistler

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**2. Narcotics § 4—possession of marijuana — sufficiency of evidence**

In a prosecution charging defendant with the felonious possession of marijuana, the State's evidence was sufficient to show that defendant possessed the drugs within the meaning of the statute, although defendant was not present in his residence at the time the drugs were seized.

APPEAL by defendant from *Brewer, Judge*, 19 April 1971 Session of Superior Court held in WAKE County.

State's evidence tended to show the following. On 27 May 1970 officers of the Raleigh Police Department and an agent of the State Bureau of Investigation went to the residence of defendant Michael Clark Kistler and his wife Sandra Anne Kistler at 120 Groveland Avenue, Raleigh, North Carolina, for the purpose of executing a search warrant to search the premises for narcotic drugs. They were admitted by defendant's wife and the warrant was read to her. Defendant was not present. The officers located a package addressed to defendant at his residence. The return address on the package was 2652 Valdez Street, Oakland, California 94612. The package contained more than 2500 grams of marijuana. Elsewhere in the residence of the defendant the officers located a pipe containing marijuana residue, cigarette papers, other vegetable matter later identified as marijuana and a set of scales. A receipt for a Western Union telegraphic money order to George Chatneuff, 2652 Valdez, Oakland, California from Michael Kistler, 120 Groveland Avenue, dated 9 May 1970 in the amount of \$500.00, plus tolls and service charges, was also discovered and introduced into evidence. A similar money order receipt dated 24 April 1970 in the amount of \$232.00 plus fees was also discovered and introduced into evidence. The latter was payable to Pat Matthews, 91 Yosemite Avenue, Oakland, California. There was other evidence tending to show that as a result of information received from California and other sources the local officers had become aware of the presence of the package addressed to defendant while it was at the Raleigh-Durham Airport and kept the same under surveillance as it was delivered to defendant's residence. Defendant offered no evidence. The jury returned a verdict of guilty of felonious possession of marijuana. From the judgment entered, defendant appealed.

*Attorney General Robert Morgan by Associate Attorney William Lewis Sauls for the State.*

*Walter L. Horton, Jr., for defendant appellant.*

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State v. Harvey

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VAUGHN, Judge.

[1] Defendant's assignments of error directed to the admission into evidence of the money order receipts are overruled. We hold that, under the circumstances of this case, the admission of the receipts did not constitute prejudicial error.

[2] Defendant's next assignment of error, that the court failed to grant his motion for nonsuit, is overruled. Although the defendant was not present in his residence at the time the drugs were seized, the State's evidence was plenary to show that defendant possessed the drugs within the meaning of the statute. See *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680, and authorities cited. See also *Ritter v. Commonwealth*, 210 Va. 732, 173 S.E. 2d 799, a case where the facts, in many respects, are similar to those in the case at hand.

Defendant's remaining assignments of error have been carefully considered and the same are overruled. Defendant received a fair trial free of prejudicial error.

No error.

Judges BROCK and BRITT concur.

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STATE OF NORTH CAROLINA v. JESSE HARVEY, JR.

No. 712SC738

(Filed 12 January 1972)

**Searches and Seizures § 1; Criminal Law § 84—seizure of marijuana in plain view**

An officer who entered defendant's home to serve a valid arrest warrant could lawfully seize a quantity of marijuana which was in plain view.

APPEAL by defendant from *Rouse, Judge*, 24 May 1971 Session of Superior Court held in BEAUFORT County.

Defendant was indicted for illegal possession of marijuana in excess of one gram. After the jury was impaneled, defendant moved to suppress the State's evidence with reference to the finding of marijuana at defendant's residence. A voir dire

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*State v. Harvey*

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was conducted and both the State and defendant offered evidence as to the circumstances surrounding the discovery of the marijuana. The court, after making findings of fact and conclusions of law, denied the defendant's motion to suppress. The State's evidence, in substance, tended to show the following. On the day of the offense a deputy sheriff of Beaufort County went to the home of defendant to arrest him on a warrant charging an offense unrelated to the present case. As the officer approached defendant's house, he observed defendant looking at him from behind the curtain of a utility room window. The officer called for the defendant by name two times and received no acknowledgment. The officer opened the door of the utility room about one foot and again called for defendant. The defendant acknowledged this call of the officer and was advised that the officer had a warrant for his arrest. Immediately behind defendant in the utility room was a chest-type freezer on which the officer observed about a spoonful of marijuana seed. The defendant was then handcuffed and the officer proceeded to scoop up the marijuana seed and placed them in a plastic jar which was also on the top of the freezer. At this time the officer observed that the plastic jar contained an additional quantity of marijuana seed and a package of marijuana. The total quantity seized was two grams of marijuana seed and .2 grams of marijuana leaf fragments. Defendant offered no evidence. From a verdict of guilty as charged and judgment thereon, defendant appealed.

*Attorney General Robert Morgan by Associate Attorney Ann Reed for the State.*

*Paul and Keenan by James E. Keenan for defendant appellant.*

VAUGHN, Judge.

The major portion of defendant's well-researched argument concerns his contention that it was error to admit evidence as to the marijuana seeds at the time of defendant's arrest. In this connection, we hold that the findings of fact by the trial judge are based on competent evidence and are amply sufficient to support his conclusions of law. Moreover, nothing appears in this record which would have required the suppression of the evidence. The law enforcement officer made a lawful entry into the home of defendant to serve a valid arrest warrant. In the

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process the officer observed within his plain view a quantity of marijuana, the possession of which constitutes a crime. Defendant's assignments of error directed to the admissibility of such evidence are overruled.

Defendant's remaining assignments of error have been carefully considered and the same are overruled. In the entire trial we find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

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STATE OF NORTH CAROLINA v. BONNIE LEE DAYE

No. 7114SC690

(Filed 12 January 1972)

**1. Criminal Law § 128—motion for mistrial—discretion of court**

A motion for a mistrial is addressed to the discretion of the trial judge, and the ruling thereon is not reviewable on appeal in the absence of a showing of an abuse of discretion.

**2. Constitutional Law § 31—identification of informer**

Police officer in a possession of heroin prosecution was not required to disclose the identity of a confidential informer.

APPEAL by defendant from *Hobgood, Judge*, 12 April 1971 Session of Superior Court held in DURHAM County.

Defendant was convicted on bills of indictment charging felonious possession and sale of heroin. From the judgments entered the defendant appealed.

*Attorney General Robert Morgan by Associate Attorney Thomas W. Earnhardt for the State.*

*A. H. Borland and Ronald H. Ruis for defendant appellant.*

VAUGHN, Judge.

[1] Defendant's first assignment of error is that the court erred in failing to grant his motion for mistrial due to the prejudicial responses of a State's witness and improper ques-

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tioning by the solicitor. "As a general rule, a motion for a mistrial is addressed to the discretion of the trial judge, and the ruling thereon is not reviewable on appeal in the absence of a showing of an abuse of discretion." *State v. Williams*, 7 N.C. App. 51, 171 S.E. 2d 39. The record before us discloses no abuse of discretion. It suffices to say that, in almost every instance, the able trial judge ruled with the defendant when defendant elected to enter timely objections to the solicitor's questions or moved to strike the responses now alleged to constitute prejudicial error.

[2] Defendant finally contends that the court erred in failing to require the police officer who purchased the heroin from defendant to disclose the identity of a confidential informer. At trial defendant did not contend, and there is nothing in this record to show, that the identity of the informer would be relevant or helpful to the defense. This assignment of error is overruled. *State v. Moore*, 275 N.C. 141, 166 S.E. 2d 53. In the trial from which defendant appealed we find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

CASES  
ARGUED AND DETERMINED IN THE  
**COURT OF APPEALS**  
OF  
NORTH CAROLINA  
AT  
RALEIGH

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SPRING SESSION 1972

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FREDERICK R. JENKINS v. STARRETT CORPORATION, SOUTHERN CONTRACTORS AND REFRIGERATION AND LONNIE S. SMITH

No. 7110SC757

(Filed 2 February 1972)

**1. Rules of Civil Procedure § 50— motion for directed verdict — consideration of defendant's evidence**

In passing on defendant's motion for a directed verdict made at the close of all the evidence, defendant's evidence that tends to contradict or refute the plaintiff's evidence is not considered, but the other evidence presented by defendant may be considered to the extent that it clarifies the plaintiff's case. G.S. 1A-1, Rule 50(a).

**2. Rules of Civil Procedure § 50— motion for directed verdict — consideration of all admitted evidence**

All relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of a ruling on a motion for a directed verdict under Rule 50(a).

**3. Electricity § 7; Sales § 22— electric shock from ice machine — negligence of former owner — insufficiency of evidence**

In an action to recover for personal injuries resulting from a severe electrical shock received when plaintiff attempted to remove ice from an outdoor ice merchandiser, the three-pronged plug supplied by the manufacturer of the machine having been changed to a two-pronged plug which prevented it from being properly grounded, plaintiff's evidence was insufficient to go to the jury on the issue of negligence of the former owner of the machine who sold it to the present

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owner, where it tended to show only that the former owner had reason to change the plug to a two-pronged plug because the receptacle where the former owner installed the machine would accept only a two-pronged plug, and that the present owner would have had no reason to change the original plug because the receptacle where he installed the machine would accept a three-pronged plug, such evidence being insufficient to show that the former owner actually did change the plug.

**4. Electricity §§ 4, 7— violation of National Electrical Code — negligence per se**

The National Electrical Code, as approved and adopted by the State Building Code Council and filed with the Secretary of State, has the force and effect of law, and its violation is negligence *per se*.

**5. Electricity § 4— National Electrical Code — applicability to owner of ice machine**

Provisions of the National Electrical Code relating to equipment grounding were applicable to the owner of an outdoor ice merchandiser installed at a service station to sell ice to the public; consequently, the trial court properly allowed such provisions to be read to the jury in an action against the owner for injuries resulting from an electrical shock received by plaintiff when he attempted to remove ice from the merchandiser.

**6. Electricity § 7; Negligence § 29— electric shock from ice machine — negligence of owner**

Plaintiff's evidence was sufficient for the jury in an action against the owner of an outdoor ice merchandiser to recover for injuries resulting from an electrical shock received by plaintiff when he attempted to remove ice from the merchandiser, where it tended to show that the owner installed the merchandiser with a two-pronged plug which failed to ground it, that when the owner bought the merchandiser he made no inspection of the machine or its plug, that the owner made no effort to ground the merchandiser, and that the failure to ground the merchandiser was a violation of the National Electrical Code.

**APPEAL** by defendants Southern Contractors and Refrigeration and Lonnie S. Smith from *Brewer, Judge*, 25 January 1971 Session of Superior Court held in WAKE County.

The parties stipulated that the record filed in this court on 12 July 1971 constituted the record on appeal. Thereafter all the parties except the defendant Smith filed motions to add to the record on appeal. The motion of Southern Contractors and Refrigeration (Southern) was belatedly contested by Lonnie S. Smith (Smith), and Smith's motion was contested by Southern. After the case was set for oral argument and the parties could not agree as to what, if anything, should be added to the record

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theretofore agreed upon, this court ordered the case remanded to the trial tribunal for settlement of the case on appeal. Judge Brewer settled the case on appeal.

Plaintiff instituted this action to recover for personal injuries received when he came into contact with the handle of an ice merchandiser owned by defendant Smith and manufactured by the Starrett Corporation (Starrett). The plaintiff alleged that on 13 June 1969, while attempting to purchase bagged ice from an outdoor merchandiser (a refrigerated self-service container) located at Edwards' Pure Oil Station (Edwards') in Raleigh, he received a severe electrical shock which rendered him unconscious and caused him other injury.

At the trial the evidence introduced by the various parties tended to establish: (1) that the ice merchandiser in question was sold by Starrett to Southern in April of 1964; (2) that Southern installed the merchandiser at Ferguson's Esso Service Center (Ferguson's); (3) that on 19 September 1966, Southern sold this and other ice merchandisers to a partnership of which the defendant Smith was the sole surviving owner on 13 June 1969; (4) in August of 1968, after Smith had purchased it, the ice merchandiser located at Ferguson's was disconnected and moved to the edge of the highway near a telephone booth about 125 feet from Ferguson's building, where it was allowed to remain unconnected by Smith for two or three months; (5) that Smith, his agents or employees, thereafter moved the merchandiser to Edwards' station where it was plugged in and operated without incident until 13 June 1969, the date of the injury to the plaintiff; (6) that Smith had full ownership and control of the merchandiser from the date of the sale in 1966, and, after installing it, maintained it and kept it filled with bagged ice pursuant to his oral contract with Edwards'; (7) that Southern had no obligation to and did not install, service or maintain the merchandiser after its sale to Smith in 1966; (8) that the injury to the plaintiff was due to the improper or non-existent grounding of the chassis of the merchandiser, either by means of a three-pronged plug and receptacle or by other acceptable means; (9) that the merchandiser was equipped with only a two-pronged plug on 13 June 1969; (10) that the receptacle into which the merchandiser was plugged at Edwards', on the date of the injury to the plaintiff, was equipped to receive a three-pronged plug; (11) that the plug on the merchandiser on this

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date was a replacement plug and not the original three-pronged plug; and (12) that the receptacle at Ferguson's into which the merchandiser had originally been plugged was of the type that would receive only a two-pronged plug.

At the close of the plaintiff's evidence, Starrett moved for a directed verdict under Rule 50 of the Rules of Civil Procedure, and the motion was allowed. There was no appeal. Starrett is not now a party in this case.

Motions for a directed verdict were made by the defendants Southern and Smith after the close of plaintiff's evidence and renewed at the close of all the evidence and were denied.

Separate issues as to the negligence of Southern and Smith were answered in the affirmative, and the issue of damages was answered in the sum of \$10,500. The defendants Southern and Smith appealed.

*Bailey, Dixon, Wooten & McDonald by Wright T. Dixon, Jr., and John N. Fountain for plaintiff appellee.*

*Broughton, Broughton, McConnell & Boxley by Charles P. Wilkins and J. Melville Broughton, Jr., for defendant appellant Southern.*

*Maupin, Taylor & Ellis by Thomas F. Ellis for defendant appellant Smith.*

MALLARD, Chief Judge.

APPEAL OF SOUTHERN

The defendant Southern presents this question for decision on appeal: "Did the Court err in denying defendant Southern's motions for a directed verdict made at the close of Plaintiff's evidence and renewed at the close of all the evidence, in rendering a judgment on the verdict, and in denying defendant Southern's motion for judgment notwithstanding the verdict?"

[1] In determining whether the evidence was sufficient to withstand a motion for directed verdict under Rule 50(a) of the Rules of Civil Procedure, all of the evidence which would tend to support the plaintiff's claim "must be taken as true and viewed in the light most favorable to him, giving him the benefit every reasonable inference which may legitimately be

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drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor." *Maness v. Construction Company*, 10 N.C. App. 592, 179 S.E. 2d 816 (1971). See also, *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969). In passing upon such motion made at the close of all the evidence, a defendant's evidence that tends to contradict or refute the plaintiff's evidence is not considered, but the other evidence presented by a defendant may be considered to the extent that it clarifies the plaintiff's case. *Blanton v. Frye*, 272 N.C. 231, 158 S.E. 2d 57 (1967); *Hill v. Shanks*, 6 N.C. App. 255, 170 S.E. 2d 116 (1969).

[2] Furthermore, we do not agree with the defendant Southern's contention that *Powell v. Cross*, 263 N.C. 764, 140 S.E. 2d 393 (1965), prohibits our consideration of the evidence adduced by its co-defendant Smith in passing upon the sufficiency of all of the evidence to withstand a motion for a directed verdict. *Powell* stands for the proposition that a plaintiff, if necessary to prove his case, may himself call the defendant or defendants as his own witness(es), and may not complain if he fails to do so and the case against one defendant is nonsuited prior to the presentation of evidence by a co-defendant. In the present case, however, all of the evidence upon which the plaintiff relied was actually produced in open court, and the general rule is that "(a)ll relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of its ruling upon a motion for judgment as of nonsuit." *Dixon v. Edwards*, 265 N.C. 470, 144 S.E. 2d 408 (1965). A motion for a directed verdict under Rule 50(a) of the new Rules of Civil Procedure presents substantially the same question as did a motion for judgment as of nonsuit under repealed G.S. 1-183. *Kelly v. Harvester Company*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Therefore, the entire record, insofar as it is relevant, may be considered on this appeal.

The general underlying factual situation, as established by the admissions and stipulations of the parties and by the evidence adduced at trial, has already been set forth at adequate length. Although the plaintiff alleged in his original complaint and his amended complaint of 22 January 1971 that the defendant Southern "was negligent in that, having purchased said machine 1) It installed the said machine in an outdoor public place, knowing the same was to be used by this plaintiff or

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others in said outdoor location," there is no serious question on this appeal as to the identity of the person who installed the merchandiser at the location where the plaintiff received his injury; that is, at Edwards', or under whose ownership and control the machine was at that time. The record, and in particular the testimony of the defendant Smith himself, clearly reveals that it was Smith who caused the merchandiser to be moved from Ferguson's (where it had been installed by Southern) to Edwards' (where the plaintiff was injured), and that Southern had no obligation to install or service the machine after its sale to Smith in 1966, nearly three years prior to the accident from which this case arose.

The plaintiff, however, attempted to show by inference that while the machine was under the ownership and control of Southern, the three-pronged plug supplied by the manufacturer was changed to a two-pronged plug; that the machine was then sold to Smith in this condition; that Smith, being unknowledgeable in matters of electricity, installed the machine by plugging the two-pronged plug into a three-prong outlet and otherwise failed to ground the machine properly; that the use of the two-pronged plug (and the absence of external grounding) prevented it from being properly grounded; that the lack of a proper ground allowed the chassis of the machine to become electrically charged on the date in question; and that Southern's changing of the plug constituted a violation of its duty of care toward the plaintiff and was a proximate cause of the plaintiff's injuries.

The principal evidentiary facts in the record from which such an inference could arise are that the receptacle at Ferguson's (where Southern had installed the merchandiser) was designed to accept only a two-pronged plug; that the receptacle at Edwards' (where Smith had installed the merchandiser) was designed to accept a three-prong plug; that the merchandiser was equipped with only a two-pronged plug at or shortly after the time of the accident on 13 June 1969; and that Smith testified that he had not changed the plug at any time that the merchandiser was under his control. Because this suggests that the defendant Smith would have had no logical reason to change the plug, but that defendant Southern might have had such a reason, plaintiff contends that these circumstances "unerringly point to Southern" as the party that changed the plug.

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Southern persistently denied having changed the plug at any time, and its president testified that the installation at Ferguson's (where there was a two-pronged receptacle) was accomplished by means of a "cheater" adapter plug, a widely sold device which accepts a three-pronged plug but which itself plugs into a two-prong outlet, providing a ground (assuming the receptacle itself is grounded) by means of an external wire which is attached to the retaining screw of the receptacle plate.

The case against the defendant Southern was apparently submitted to the jury on the theory of liability embodied in §§ 401 and 402 of the Restatement of Torts 2d, and the case of *Veach v. American Corp.*, 266 N.C. 542, 146 S.E. 2d 793 (1966), relating to the liability of a seller of a second-hand chattel for latent defects. We think *Veach* is distinguishable, and in the case before us, we do not think that any latent defect is involved.

The decisive question, therefore, is whether or not the evidence adduced at the trial, when viewed in the light most favorable to the plaintiff, was sufficient to withstand the motion for directed verdict. "(T)he plaintiff must present evidence of actionable negligence on the part of the defendant in order to carry his case to the jury. To establish actionable negligence plaintiff 'must show: (1) That there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which defendant owed to the plaintiffs under the circumstances in which they were placed; and (2) that such negligent breach of duty was the proximate cause of the injury, a cause that produced the results in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts that existed. \* \* \*'" *Hubbard v. Oil Co.*, 268 N.C. 489, 151 S.E. 2d 71 (1966).

In the case before us, the plaintiff attempted to show that Southern had exchanged the three-pronged plug with which the merchandiser had been equipped by its manufacturer for a two-pronged plug, and that it sold the merchandiser to Smith so equipped, yet his own evidence is entirely devoid of any evidence of when or by whom the exchange was made. It is true that Smith testified that he personally had never changed "the electrical mechanism or cords" on any of the machines that he had purchased from Southern, but he also testified: "When I pur-

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chased those ice merchandisers, I did not make an inspection of them. I did not hire an electrician to make an inspection of them." A witness for Southern denied that the exchange had been made during the period that the merchandiser was under its control; the only evidence as to the condition of the plug on the merchandiser at the time it was sold to the Smith partnership was the testimony of Southern's president.

The evidence is insufficient to establish that Southern removed the three-pronged plug from the machine and does not raise a question of credibility for the determination of a jury. The merchandiser appears to have been situated at all times on property not subject to the direct control and supervision of its owners and to have been allowed to sit unconnected and unattended by the roadside for several months in the Fall of 1966, after Southern had relinquished all ownership and control of it. Nearly three years then elapsed before the plaintiff was injured. We agree with Southern that to hold it liable under such circumstances would be to make it virtually a guarantor of facts and circumstances over which it could have no control.

[3] Inasmuch as the burden of establishing negligence is on the plaintiff, evidence which raises only a *conjecture* of negligence may not properly be submitted to the jury. To hold that evidence that a defendant *could have been* negligent is sufficient to go to a jury, in the absence of evidence, direct or circumstantial, that such a defendant *actually was* negligent, is to allow the jury to indulge in speculation and guesswork. See *McDonald v. Heating Co.*, 268 N.C. 496, 151 S.E. 2d 27 (1966); *Clark v. Scheld*, 253 N.C. 732, 117 S.E. 2d 838 (1961); *Boyd v. Harper*, 250 N.C. 334, 108 S.E. 2d 598 (1959); *Wall v. Trogdon*, 249 N.C. 747, 107 S.E. 2d 757 (1959); *Edens v. Adams*, 3 N.C. App. 431, 165 S.E. 2d 68 (1969). The plaintiff's contention that the defendant Southern may have had reason to replace the three-pronged plug and that defendant Smith did not does not rise to the dignity of evidence tending to show that Southern actually *did* make such an exchange. Therefore, we hold that the evidence was insufficient on this issue and that it was error to deny this defendant's motion for a directed verdict under Rule 50 at the close of the evidence. It follows, therefore, that the court should have also dismissed the cross-action of Smith against Southern.

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APPEAL OF SMITH

[4] The defendant Smith contends that it was error for the trial court to deny his motions for directed verdict and judgment notwithstanding the verdict. He assigns as error the fact that one of the plaintiff's witnesses was allowed to read specific sections from the National Electrical Code of 1968 regarding the grounding of electrical appliances, and that Judge Brewer later referred to and read from the same Code in charging the jury. (The National Electrical Code 1971 became effective 1 January 1972.) This defendant concedes in his brief that the National Electrical Code 1968, as approved and adopted by the State Building Code Council on 10 December 1968 and on file with the Secretary of State on 13 June 1969, had the force and effect of law and that its violation was negligence *per se*. See *Jenkins v. Electric Company*, 254 N.C. 553, 119 S.E. 2d 767 (1961); *Drum v. Bisaner*, 252 N.C. 305, 113 S.E. 2d 560 (1960). The pertinent and relevant parts of the National Electrical Code 1968 were admissible as evidence in this case. *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955).

[5] It is Smith's contention, however, that the National Electrical Code is not applicable *to him*; therefore, that the introduction of its provisions in the trial of the present case created an inappropriate and higher standard of care than that which he could be required to observe toward the plaintiff, and was erroneous. We do not agree.

Neither the State Building Code nor the National Electrical Code precisely defines the class of persons to which they are applicable. This is also true in a number of the decided cases which contain excellent discussions of the history and purposes of the State Building Code Council and Code; for example, *Jenkins v. Electric Company*, *supra*; *Drum v. Bisaner*, *supra*; and *Lutz Industries, Inc. v. Dixie Home Stores*, *supra*. These cases generally have involved the installation of electrical wiring and equipment by an electrician or electrical contractor, and Smith contends that the cases are distinguishable and not applicable to him because fixtures to real property were involved. We have carefully considered the State Building Code, the National Electrical Code and prior decided cases, however, and find nothing which would have restricted the application of the National Electrical Code 1968 to fixtures to real property and nothing which would specifically exempt this defendant from its requirements.

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The pertinent portions of G.S. 143-138, at the time of the injury to the plaintiff, read as follows:

“(b) Contents of the Code—The North Carolina State Building Code, as adopted by the Building Code Council, may include . . . regulations of chimneys, heating appliances, elevators, and other facilities connected with the buildings; regulations governing plumbing, heating, air-conditioning . . . and *electrical systems*. (regulations for which electric systems may be the National Electric Code, as approved by the American Standards Association and filed with the Secretary of State); and other such reasonable rules and regulations pertaining to the construction of buildings and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building, its neighbors, and members of the public at large.

\* \* \*

(c) Standards to Be Followed in Adopting the Code.—  
\* \* \* Requirements of the Code shall conform to good engineering practice, as evidenced generally by the requirements of . . . the National Electric Code . . . ” (Emphasis added.)

The National Electrical Code 1968, which is on file in the office of the Secretary of State, provides in part:

“The purpose of this Code is the practical safeguarding of persons and of buildings and their contents from hazards arising from the use of electricity for light, heat, power, radio, signalling and for other purposes. Art. 90, § 1(a).

This Code contains basic minimum provisions considered necessary for safety. \* \* \* Art. 90, § 1(b).

It covers the electric conductors and *equipment installed within or on* public and private buildings and other premises, including yards, carnival and parking lots, and industrial substations; also the conductors that connect the installations to a supply of electricity, and other outside conductors adjacent to the premises . . . . ” (Emphasis added.) Art. 90, § 2(a).

“Equipment” is defined as “(a) general term including material, fittings, devices, appliances, fixtures, apparatus and

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the like used as a part of, or in connection with, an electrical installation." (Emphasis added.) Art. 100. An "appliance" is "... utilization equipment, generally other than industrial, normally built in standardized sizes or types, which is installed or connected as a unit to perform one or more functions such as clothes washing, air conditioning, food mixing, deep frying, etc." Art. 100. An "appliance—fixed" is one which "is fastened or otherwise secured at a specific location." Art. 100.

The defendant Smith's exception to the following portion of the court's instructions is without merit:

"The Court instructs you members of the jury, that North Carolina has adopted the National Electrical Code to govern the conduct of the installation of equipment; and I will read to you at this time, members of the jury, a section, 250-42, which deals with equipment grounding, which reads as follows: 'Under any of the following conditions exposed non-current carrying metal parts of fixed equipment which are liable to become energized shall be grounded. Where the equipment is located in a wet location and is not isolated, where the equipment is located within reach of a person who can make contact with any grounded surface or object, where the equipment is located within reach of a person standing on the ground.'

I also read to you members of the jury, the National Electrical Code, Section 250-57, as it deals with fixed equipment 'by means of a grounding conductor run with the power supply conductors in a cable assembly or flexible cord that is properly terminated in an approved grounding type attachment plug having a fixed grounding contacting member, the grounding conductor as a cable assembly may be uninsulated but where individual covering is provided for such conductors, it shall be finished in (sic) a continuous green color or a continuous green color with one or more yellow strips (sic).'

In the second portion of this part of the charge, Judge Brewer was apparently referring to Art. 250, § 59(b) rather than § 57, as stated, but this inadvertence was not prejudicial to the defendant. We also note that Art. 250, § 45(d) requires, without any reference to Art. 250, § 42 (which was read by the judge and would also appear to be applicable), that:

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“Under any of the following conditions, exposed non-current-carrying metal parts of cord and plug connected equipment, which are liable to become energized, shall be grounded: (d) In other than residential occupancies, (1) refrigerators, freezers, air conditioners . . . .”

[6] This ice merchandiser was a refrigerator. We hold, therefore, that the National Electrical Code 1968 was applicable to the defendant Smith in the present case. Smith's own testimony clearly establishes that he installed the ice merchandiser at Edwards' where the plaintiff was injured; that he had made no inspection of the machine or its plug; and that he made no effort to ground it. There was also ample evidence from which the jury could find that the plaintiff was injured as the proximate result of the defendant Smith's failure to insure that the ice merchandiser was properly grounded, and that the failure to properly ground the machine was a violation of the National Electrical Code 1968 and otherwise a violation of the duty of care owed to this plaintiff as a member of the using public. Inasmuch as this defendant was actively engaged in vending ice to the public by means of an electrical appliance, and subject to the requirements of the National Electrical Code, his ignorance of electricity and of the Code is clearly no defense. We find no prejudicial error in the trial as to Smith.

Reversed as to defendant Southern.

No error as to defendant Smith.

Judges CAMPBELL and HEDRICK concur.

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Smith v. Kilburn

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PAULINE PARRISH SMITH, ADMINISTRATRIX OF WELDON  
PARRISH, DECEASED v. JIMMY DALE KILBURN

No. 718SC695

(Filed 2 February 1972)

1. Rules of Civil Procedure § 50— directed verdict — consideration of evidence

On motion for directed verdict the evidence must be considered in the light most favorable to the plaintiff.

2. Negligence § 29— proof of negligence — sufficiency of evidence

The plaintiff in a wrongful death action was not required to prove all of the acts or omissions which she alleged constituted negligence on the part of defendant; proof of negligence in only one respect was sufficient if it proximately caused the injuries and death of her intestate.

3. Trial § 21— consideration of evidence — inconsistencies in the evidence

Inconsistencies in the evidence are ultimately for the jury to resolve.

4. Automobiles § 17— right side of the highway — violation of statute

Violation of the statute requiring motor vehicles to be driven on the right side of the highway is negligence *per se*. G.S. 20-146(a).

5. Automobiles § 62— striking pedestrian — motorist on left side of highway — sufficiency of evidence

The plaintiff in a wrongful death action offered sufficient evidence—including physical evidence of tire marks at the scene and the defendant's statements to the investigating officer—to support a jury finding that the defendant was driving on the left-hand side of the street when he struck the plaintiff's intestate; consequently, it was reversible error for the trial court to direct verdict for the defendant and to dismiss the plaintiff's action. G.S. 20-146(a).

APPEAL by plaintiff from *Cohoon, Judge*, 31 May 1971 Session of Superior Court held in WAYNE County.

This is a civil action to recover damages for the wrongful death of plaintiff's intestate, Weldon Parrish, a pedestrian, who died as a result of injuries received when he was struck by defendant's automobile at approximately 1:30 a.m., 14 July 1968, on Stronach Avenue in Goldsboro, N. C., near the point where Herring Street enters Stronach Avenue. At that point Stronach Avenue is an asphalt paved street approximately 26 feet wide which runs east and west. Herring Street is an unpaved dirt street which runs north and south and dead ends into

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Stronach Avenue from the south to form a "T" intersection. The intersection was lighted by a street light, consisting of a light bulb with a shield over it, located on the north side of Stronach Avenue east of Herring Street. There were no paved sidewalks on either side of Stronach Avenue or of Herring Street. There were residences on both sides of Stronach Avenue. The posted speed limit on Stronach Avenue was 25 miles per hour. The weather was dry. Weldon Parrish resided in a house on the south side of Stronach Avenue approximately 300 feet west from the point where Herring Street enters Stronach Avenue.

Plaintiff alleged that defendant, driving westwardly on Stronach Avenue, suddenly swerved to the left of the center line of Stronach Avenue and struck Parrish, while he was in an unmarked crosswalk at a point approximately three feet from the southwestern edge of the curve at Herring Street and Stronach Avenue. Plaintiff alleged that Parrish's death was proximately caused by defendant's negligence in driving at an excessive speed, in failing to keep a proper lookout, in failing to keep his automobile under control, in driving to the left of the center line of Stronach Avenue while not in the act of passing, in operating his automobile while under the influence of alcoholic beverage, and in other respects. Defendant answered, denying material allegations of the complaint and specifically denying negligence on his part, and pleaded contributory negligence on the part of Weldon Parrish.

Plaintiff presented witnesses who testified in substance (except where quoted) as follows :

Ethel Glisson testified: She lived on Stronach Avenue across the street from the residence of Weldon Parrish. At about 1:00 or 1:30 a.m. on 14 July 1968 she was sitting with her daughter on her front porch, waiting for her son-in-law to return home. She observed a vehicle on Herring Street coming to the intersection of Herring Street and Stronach Avenue. The vehicle had its lights on and stopped on Herring Street. When she next saw it, she heard a "blunder," by which she meant it "sounded like something hit together," and the car stopped "right in the middle of the road on Stronach Avenue." A man got out of the car and came around in front of the headlights. The man was the defendant. Mrs. Glisson went in her house

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and called her son and his wife, who lived next door to her. On cross-examination Mrs. Glisson testified:

"The automobile was coming along Herring Street when I first saw it, and the lights were shining out in front of it. And it was illuminating the area around the intersection of these two streets. I did not see any person walking along. This was just a minute before I heard a bump, just a minute after the car turned and I heard something slam together and whenever I looked, the man was stopped in the middle of the road.

"I actually saw the car when it was turning and I see it wasn't my son-in-law and so I didn't keep looking at the car. When the car turned the headlights turned toward my house. It illuminated the street in this general area. I did not see any person walking along the street in this general area. I was not looking at the car at the time of the bump.

"... Just as it was turning, I took my eyes off of it because I knew it won't my son-in-law's car and I heard it, I heard the blunder, I turned around and looked and this man got out and he come around in front of the headlights.

"The last time I saw the car it wasn't going too fast. I can't estimate mileage because I don't drive a car myself. It weren't going too fast and it weren't going too slow, just ordinary."

Pearl Glisson, Mrs. Ethel Glisson's daughter-in-law, testified that when her mother-in-law called, she and her husband left their house and went out to the street. She testified:

"When we left our house and went out the front door we walked to the left. We saw a car sitting there in the street, and didn't see anything else in the street except him, Weldon Parrish. He was laying beside the street. Part of his body was on the street and the rest of him was laying off the street. With respect to where his body was laying off the street, Weldon Parrish's body was laying on the side that Weldon Parrish lived on. Approximately his legs was off the street. . . . The car was stopped and parked in the center of the paved surface of the road. . . .

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"Weldon Parrish was laying as you come out of Herring Street. . . .

"There are no walkways of any kind for pedestrians on the side of Stronach Avenue across the street from my mother-in-law's house. I have walked up that side of Stronach Street (sic), and you have to walk on the dirt leading off from the street."

B. F. Smith, who at the time of the accident was one of the investigating police officers for the City of Goldsboro, testified that on the night of the accident he talked with the defendant and inquired as to why his vehicle had been on the left-hand side of the road and that "[h]e told me he drove to the left side of the road to avoid two pedestrians who were walking on the North side of the street, and that he struck Mr. Parrish. Mr. Parrish stepped out in front of his vehicle. He did not say anything about how long prior to the time that he had struck him that he had been driving on the left side of the road." Smith also testified that the back of defendant's car was about 80 feet from the intersection of Herring and Stronach and Parrish's body was 10 or 15 feet behind the rear of the car, that there was some dirt on Stronach just north of where Herring comes in, and he observed tire impressions in the dirt.

Smith also testified that the corner at the intersection of Herring Street and Stronach Avenue is "actually a rounded street corner," and

"There were no sidewalks on either side of Stronach Avenue. . . . Immediately South of Stronach Avenue and West on Herring Street there is some shrubbery just off the street there and at the intersection of Herring and Stronach, there is a wooden frame house. . . . The shrubbery ran parallel with Stronach Avenue. . . .

"There are houses along Stronach on both the north and south side. Dirt lies between the property line and the paved surface. I don't know how wide, I don't know where the property line is. I don't know exactly how much dirt there is between the paved surface and the shrubs I was speaking of. There was four foot of a walk, four foot of a shoulder there that night. . . . I don't recall exactly how the shoulder was. I recall from my report the measurements. There was a four-foot shoulder on each side."

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O. N. Weaver, also an investigating police officer, testified that Parrish's body was lying partially on the highway and partially on the shoulder, his head and body being on the highway and his legs off the highway, approximately 40 or 50 feet from the southwestern corner of Stronach Avenue and Herring Street. Defendant's car was about two car lengths west of Parrish's body. The left front fender of the car was slightly indented, and there was blood or clothing on the exterior of the fender and some up around the windshield on the left side of the car on the driver's side. He detected the odor of alcohol on defendant's breath, but defendant walked and talked in a normal manner.

T. L. Strickland, a State Highway Patrolman who investigated the accident, testified that he found Parrish's body about 20 feet to the rear of the car which was pointing in a westerly direction in the approximate center of Stronach Avenue. The body was less than 50 feet from the intersection of Stronach Avenue and the dirt street. One shoe was on the body and one was off. The shoe which was off was still tied. The car "was situated almost in the center of the street with a slight angle of the front of the vehicle more north than the rear." There were marks on Stronach Avenue leading east away from the rear wheels of the Kilburn vehicle. The marks continued east onto where the dirt street intersects Stronach. "The dirt had been left onto the pavement and that's how you could trace them across this dirt. At that point, they stopped being black skid marks and were simply plowing marks through the dirt." Patrolman Strickland testified that he talked with defendant at the scene, and defendant stated that he had been to a friend's house and had been drinking and was en route home, that he had come up Wayne Memorial Drive and made a left turn onto Stronach, that "[a]s he approached this vicinity where the accident occurred, there was some individuals walking on the right-hand shoulder of the road in the direction he was traveling; that he pulled to the left onto the left side of the pavement to go around these people that were walking; . . . that they were in the roadway and he sounded his horn for them and just as he got out into the left lane and started around them, this man, and that was the word he used, walked right out from behind some bushes right in front of his automobile and he hit his brakes and hit the man." Patrolman Strickland also testified:

"Mr. Kilburn did not make any statement in my presence as to how far he had traveled from the intersection of

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the dirt road and Stronach Avenue before he struck Mr. Parrish. He stated that the man came out from behind some bushes right at the intersection and that he applied his brakes and struck him. At this intersection there were some bushes which he showed me as being where the man came from. These are shrub bushes. At the time they were about three feet high and they were located in the yard. From the paved portion to where they were actually located is probably eight feet.

\* \* \* \* \*

"... The bushes from which Mr. Kilburn said the man came, they were some feet west of the intersection, about 25 feet from the true center of the intersection. The intersection makes a circle in this private residence yard. . . . There is an opening in the bushes. . . . It's just an opening in the bushes that at that point where people had been walking through. It was to the north of the house that was situated on the intersection of Herring and Stronach. This house is about 30 feet from Herring Street. The spot where Mr. Kilburn said the person came through would have been at least 30 or 35 feet from Herring Street and maybe north of Herring Street. . . .

"... In my opinion it is 7 or 8 feet from the center of the bushes which I have referred to the south edge of the pavement of Stronach Avenue. That is the distance a person would have to walk from the bushes to get onto the edge of the surface of Stronach. . . . Between the bushes and the southern edge of the pavement of Stronach Avenue a distance of 7 or 8 feet, there is no obstruction between the bushes and the edge of the pavement for westbound traffic on Stronach Avenue."

Plaintiff also introduced evidence as to her intestate's age, life expectancy and earnings.

At the close of plaintiff's evidence defendant moved for a directed verdict on the grounds that plaintiff had not shown that defendant was guilty of any of the acts of negligence set forth in the complaint and that plaintiff's own evidence showed that her intestate was guilty of contributory negligence which was a proximate cause of his injuries and death. The motion was allowed, and from judgment directing verdict in favor of the defendant and dismissing the action, plaintiff appealed.

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*Herbert B. Hulse and Sasser, Duke & Brown by John E. Duke for plaintiff appellant.*

*Dees, Dees, Smith & Powell by William W. Smith for defendant appellee.*

PARKER, Judge.

[1-3] Considering the evidence in the light most favorable to the plaintiff, as we must in passing upon the trial court's ruling on defendant's motion for a directed verdict, *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396, it is our opinion that this case should have been submitted to the jury. Plaintiff was not required to prove all of the acts or omissions which she alleged constituted negligence on the part of defendant; proof of negligence in only one respect was sufficient if it proximately caused the injuries and death of her intestate. *Funeral Home v. Pride*, 261 N.C. 723, 136 S.E. 2d 120; *Krider v. Martello*, 252 N.C. 474, 113 S.E. 2d 924. Inconsistencies in the evidence will ultimately be for the jury to resolve; for present purposes they must be resolved in plaintiff's favor. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47.

Viewing the evidence in the case before us in the light most favorable to plaintiff, resolving contradictions therein in her favor, and giving her the benefit of every reasonable inference which may be drawn therefrom, a jury could legitimately find the following:

While driving his car late at night westwardly on a city street through a residential section, defendant drove across the middle of the street and into the left-hand lane provided for eastbound traffic. In so doing, the left front side of defendant's automobile struck plaintiff's intestate with sufficient force to throw his body up against the left side of the windshield and thence over or off of the car to the edge of the pavement and partially off of the pavement on the south side of the street, inflicting injuries causing his death. This much was established by the physical evidence at the scene. After striking plaintiff's intestate, defendant's car came to a stop, still in the middle of the street and still headed in a westerly direction, but at a slight angle, its front being "more north than the rear." From this it is a legitimate inference that the car had come to its stopped position from a point farther into the left-hand lane. Defend-

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ant's car came to a stop on Stronach Avenue at a point approximately 80 feet west of its intersection with Herring Street, a dirt street which enters Stronach Avenue from the south. There were tire marks on the asphalt pavement on Stronach Avenue which extended eastward from the rear wheels of the car back into the area where dirt from Herring Street came over the pavement on Stronach Avenue. From this the jury could legitimately find that defendant had driven his car in the left-hand lane of Stronach Avenue at least from the point where Herring Street intersects. Whether defendant entered Stronach Avenue from Herring Street after stopping on Herring Street, as one of plaintiff's witnesses testified, or from some street farther to the east, as defendant's statement to the police officers would indicate, may ultimately be for the jury to determine. For present purposes the discrepancy is immaterial, since under either version the jury could find that defendant was driving on the left-hand side of the street when he struck plaintiff's intestate.

[4] G.S. 20-146(a) provides, subject to certain exceptions set forth in the statute, that "[u]pon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway." Violation of this statute is negligence *per se* which, when it is the proximate cause of injury, constitutes actionable negligence. "When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidence makes out a *prima facie* case of actionable negligence. (Citations omitted.) The defendant, of course, may rebut the inference arising from such evidence by showing that he was on the wrong side of the road from a cause other than his own negligence." *Anderson v. Webb*, 267 N.C. 745, 148 S.E. 2d 846.

[5] Viewing the evidence in the present case in the light most favorable to plaintiff, the jury could legitimately find that defendant violated G.S. 20-146(a) and that such violation was a proximate cause of the injuries and death of her intestate. Defendant's statement to the officers that he had driven on the left because pedestrians were obstructing his right lane, if accepted as true, may show that he was on the wrong side of the road from a cause other than his own negligence. However, the officers, not the defendant, were presented by the plaintiff as her witnesses, and by examining the officers as to statements

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which defendant made to them, plaintiff in no way vouched for the credibility of the defendant nor was she or the jury bound to accept his statements as the controlling truth. Even accepting his statements as true, it is our opinion this case should have been submitted to the jury, both on the issue of defendant's actionable negligence and on the issue of plaintiff's intestate's contributory negligence. In our view it was for the jury to determine whether defendant, driving at night on a 26-foot wide paved city street which had four-foot wide dirt shoulders on each side, exercised that degree of care which an ordinarily prudent man would exercise when he drove so far to the left as he did in order to pass the pedestrians who, so he told the patrolman (according to the version most favorable to the plaintiff), were "walking on the right-hand shoulder of the road in the direction he was traveling." Nor do we think the evidence so clearly establishes contributory negligence on the part of plaintiff's intestate as to make this a matter of law; it was still for the twelve.

The judgment directing verdict for defendant and dismissing plaintiff's action is

Reversed.

Judges CAMPBELL and MORRIS concur.

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STATE OF NORTH CAROLINA v. CARL STEVEN BAUGUESS

No. 7123SC670

(Filed 2 February 1972)

1. Constitutional Law § 30— speedy trial — delay of ten months between crimes and issuance of warrant

Defendant was not denied the constitutional right to a speedy trial on charges of forgery and uttering a forged check by a delay of more than ten months between the commission of the crimes and the issuance of a warrant charging defendant with the crimes, where the cause of the delay was that police officers were waiting for a report from F.B.I. handwriting experts in Washington as to whether the checks in question and other checks drawn on the same account were forgeries.

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## 2. Forgery § 1— elements of forgery

The three elements necessary to constitute the offense of forgery are: (1) a false making or other alteration of some instrument in writing; (2) a fraudulent intent; and (3) an instrument apparently capable of effecting a fraud.

## 3. Forgery § 2— sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for forgery of a check where it tended to show not only that the purported signer of the check in question had no authority to sign a check on the account upon which it was drawn, but that he was a fictitious person, and that defendant was the person who was in possession of and actually uttered the check.

APPEAL by defendant from *Exum, Judge*, 21 June 1971  
Criminal Session of Superior Court held in WILKES County.

Defendant pleaded not guilty and was tried on charges made by bill of indictment, proper in form, which charged him in separate counts with the forgery and with the uttering of a forged check. The check was particularly described in each count as follows:

"SECOND STREET BP

P. O. Box 1327

N. Wilkesboro, N. C. 28659

602

Date 6-1 1970

Pay to the order of Bobby Miller

\$75.00

Seventy-Five and 00/100 — — — — — DOLLARS

The Northwestern Bank

North Wilkesboro, N. C. 28659

':0531'''0216': 0011026524

C. A. Swofford

0000007500"

The State's witnesses testified in substance as follows:

The cashier of Lowe's Super Market in North Wilkesboro testified that defendant was the person who had presented the check to her on 1 June 1970 in payment for merchandise costing approximately \$4.00. The cashier accepted the check, which was identified and introduced in evidence as State's Exhibit 1, and gave defendant cash for the balance. At the time, the cashier did not know defendant, did not know anyone named Bobby Miller or anyone named C. A. Swofford, and did not know who ran Second Street BP, but had cashed checks for that firm. The check was sent to the Northwestern Bank to be cashed, but pay-

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ment was refused by the bank because the signature "C. A. Swofford" was not authorized, and Lowe's Super Market lost the amount of the check.

An assistant cashier of the bank testified that the bank's records disclosed that on 1 June 1970 Second Street BP had a business account at the bank which had been assigned number 0011026524; that there were three authorized signatures on the account, being those of Ronald Hamby and Dean Spears, partners, and Rebecca Riddle, bookkeeper; that the signature, C. A. Swofford, on the check was not one of the signatures authorized on the account, and for that reason the check was not paid when presented to the bank.

Ronald Hamby testified that sometime prior to 1 June 1970 he and a partner, Dean Spears, ran a service station known as "B.P. Service Station on Second Street." They had a bank account at that time and State's Exhibit 1 was one of their checks. When they closed the service station, they left some blank checks in the building. Hamby later went back and found their checkbook was gone. Only Hamby, his partner, Dean Spears, and the bookkeeper, Rebecca Riddle, had authority to draw checks on the Second Street BP account at the bank. Hamby did not give the check, State's Exhibit 1, to anyone and did not authorize anyone to draw the check. Neither Hamby nor his concern owed Bobby Miller any money for anything and Hamby did not recollect anybody by the name of Bobby Miller. Hamby knew Carl Swofford, but did not know his initials. Carl Swofford was the Sinclair distributor and owned the station they were renting. Hamby knew defendant prior to 1 June 1970. Defendant and his father and brothers ran a place of business across the street and approximately 100 yards from Hamby's station.

The Chief of Police of North Wilkesboro testified that he had made an investigation and had been unable to find any person in the county by the name of C. A. Swofford. He knew Carl Swofford and Jim Swofford, who were brothers and who were the BP distributors for the area, but neither of them had a middle initial "A." The Police Chief testified, without objection, that he had talked to Carl Swofford and to Jim Swofford and "Jim Swofford said he knew all the Swoffords in the county and he did not know of one by that initial."

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Defendant did not introduce evidence. The jury found him guilty on both counts, and from sentences imposed, defendant appealed.

*Attorney General Robert Morgan by Staff Attorney Ernest L. Evans for the State.*

*Larry S. Moore for defendant appellant.*

PARKER, Judge.

[1] The crimes with which defendant was charged were alleged in the bill of indictment to have been committed on 1 June 1970. Warrant for his arrest on these charges was issued on 16 March 1971. He was given a preliminary hearing in the district court on 9 April 1971. The bill of indictment was returned as a true bill and he was brought to trial at the 21 June 1971 session of superior court, which was the first regularly scheduled session of superior court for trial of criminal cases to be held in Wilkes County after defendant's arrest. Prior to impaneling of the jury, defendant moved to quash the indictment on the grounds he had been denied his constitutional right to a speedy trial. The motion was overruled and in this we find no error.

Before ruling on the motion to quash, the trial judge conducted a voir dire examination of the Chief of Police of North Wilkesboro, who testified that within 30 days after 1 June 1970 he had information which caused him to suspect defendant of uttering the check, but did not then have a witness to identify defendant as the man who did so; that a number of checks had been stolen from the BP Station on Second Street; that he could get no handwriting expert in the State to work on these checks and had had to send them to the F.B.I. in Washington; and that the checks had been gone most of the time, back and forth, to the F.B.I. Laboratory in Washington. Under these circumstances, we hold that defendant failed to show that the delay in issuing the warrant was either deliberately or unnecessarily caused by the prosecution or that the length of the delay was such as to create a reasonable possibility of prejudice to defendant. "The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case." *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274.

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[2, 3] There was also no error in submitting this case to the jury under both counts in the bill of indictment. Insofar as the first count is concerned, three elements are necessary to constitute the offense of forgery: (1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud. *State v. Greenlee*, 272 N.C. 651, 159 S.E. 2d 22; *State v. Brown*, 9 N.C. App. 498, 176 S.E. 2d 881. The State's evidence here tended to show not only that C. A. Swofford, the purported signer of the check in question, had no authority to sign a check on the account upon which it was drawn, but that, indeed, he was a fictitious person. "If the name signed to a negotiable instrument, or other instrument requiring a signature, is fictitious, of necessity, the name must have been affixed by one without authority, and if a person signs a fictitious name to such instrument with the purpose and intent to defraud—the instrument being sufficient in form to import legal liability—an indictable forgery is committed." *State v. Phillips*, 256 N.C. 445, 124 S.E. 2d 146; accord, *State v. Dixon*, 185 N.C. 727, 117 S.E. 170; Annot., 49 A.L.R. 2d 852. In *State v. Phillips*, *supra*, Moore, J., speaking for the Court, quoted with approval from 37 C.J.S., Forgery, Section 82, p. 94, as follows:

"Evidence that the name signed to an instrument is that of a fictitious person is admissible to prove that the instrument is a forgery, and any circumstantial evidence tending to prove that the name is that of a fictitious person is likewise admissible. Thus persons so situated that they would probably know the signer if he existed may testify that they do not know of any such person. Similarly, evidence as to the result of inquiries made for persons whose names appear on an instrument is admissible to show their nonexistence, although the person making the inquiries may have been unacquainted with the place, or the search may not have been extensive."

Thus, here the evidence would support a jury finding that when someone affixed the signature, C. A. Swofford, to the check, a forgery was committed. There was direct evidence that the defendant was the person who was in possession of and actually uttered the check, obtaining value therefor. This evidence was sufficient to support a jury finding that defendant had him-

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self forged the check. *State v. Welch*, 266 N.C. 291, 145 S.E. 2d 902; 36 Am. Jur. 2d, Forgery, Section 44, p. 706.

We have examined appellant's remaining assignments of error and find no error prejudicial to defendant.

No error.

Judges CAMPBELL and MORRIS concur.

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STATE OF NORTH CAROLINA v. RICHARD ROM ELLEDGE

No. 7123SC702

(Filed 2 February 1972)

1. Constitutional Law § 32; Criminal Law § 21— waiver of preliminary hearing — absence of counsel

An indigent defendant who waived a preliminary hearing at a time when he was not represented by counsel failed to show that he was prejudiced by the absence of counsel, notwithstanding that he was entitled to counsel at the time of waiver. G.S. 7A-451.

2. Criminal Law § 23— withdrawal of guilty plea

Withdrawal of a plea of guilty after its acceptance by the court is not a matter of right, and a motion to be allowed to do so is addressed to the sound discretion of the trial court.

3. Criminal Law § 23— validity of guilty pleas— waiver of preliminary hearing in absence of counsel

Although an indigent defendant had a statutory right to counsel at the time he waived preliminary hearing in 1970, the failure to accord him this statutory right did not as a matter of law invalidate his subsequent pleas of guilty to felonious breaking and entering and felonious larceny, where the pleas were given at a time when defendant was represented by counsel and the trial court fully inquired into and determined the voluntariness of the pleas, and where defendant's pleas of guilty were not induced by the fact he had not been accorded his statutory right to appointment of counsel at the time he was brought before the court for the preliminary hearing or by the fact he waived such a hearing.

4. Criminal Law § 146— appeal from guilty plea — question presented

Appeal from the sentence imposed upon defendant's pleas of guilty presented only one question for review on appeal, whether error of law appears on the face of the record proper.

5. Constitutional Law § 33— self-incrimination — defendant's testimony in trial of another defendant

A defendant who, after he had entered a guilty plea but before his sentence of imprisonment had been imposed, was required to testify as a State's witness in the trial of another defendant for the same

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crimes which defendant had pleaded guilty *is held* not deprived of his right against self-incrimination.

**6. Indictment and Warrant § 7— requisites of information**

Although the information signed by the solicitor was referred to in the record as a presentment, such "presentment" was fully effective as an information. G.S. 15-140.1.

**APPEAL** by defendant from *Exum, Judge*, 21 June 1971 Criminal Session of Superior Court held in WILKES County.

At the 27 July 1970 special criminal session of Superior Court held in Wilkes County, at which Judge J. William Copeland presided, defendant, represented by court-appointed counsel, waived the finding and return into open court of a bill of indictment and consented to be tried on an information signed by the solicitor charging defendant with (1) felonious breaking and entering and (2) felonious larceny. As required by G.S. 15-140.1, defendant and his counsel signed a written waiver of indictment, which appeared on the face of the information. Upon arraignment, defendant pleaded guilty to both charges. Before approving acceptance of the pleas, Judge Copeland examined defendant as to whether he did so voluntarily and with full understanding. At the conclusion of this examination defendant signed and swore to a written transcript of the pleas. Judge Copeland thereupon found that defendant's pleas of guilty were freely, understandingly and voluntarily made, and ordered that defendant's pleas of guilty be entered in the record. Prayer for judgment was continued until the next session of Superior Court to be held in Wilkes County, and defendant was released on bond.

Defendant failed to appear at the sessions of Superior Court held in Wilkes County which were held in October and December 1970 and in February and April 1971, and capiases were issued at each session for his arrest. Thereafter, defendant was arrested on a capias, was allowed a new bond, and was again released from custody. Defendant, represented by counsel, appeared at the session of Superior Court held for the trial of criminal cases in Wilkes County which commenced on 21 June 1971, at which Judge James G. Exum, Jr., presided. Defendant moved to be permitted to withdraw his pleas of guilty and moved to remand the case for preliminary hearing, on the ground that he had not been afforded an attorney at the time he had waived a preliminary hearing. After hearing on these motions, at which defendant testified in support of his motions, Judge Exum entered an order making findings of fact and con-

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clusions of law, including findings and conclusions that defendant's pleas of guilty entered at the July 1970 session had been freely, understandingly and voluntarily made. Judge Exum denied both of defendant's motions and entered judgment upon defendant's pleas of guilty, sentencing defendant to prison for not less than four nor more than ten years, but directing that defendant be given credit for time spent in jail awaiting trial. Defendant appealed.

*Attorney General Robert Morgan by Assistant Attorney Eugene Hafer for the State.*

*J. Gary Vannoy for defendant appellant.*

PARKER, Judge.

Appellant's first two assignments of error are directed to Judge Exum's denial of his motion to be permitted to withdraw his pleas of guilty and denial of his motion to remand the case for a preliminary hearing. These assignments of error are without merit and are overruled.

[1] This criminal proceeding was commenced 18 March 1970 by issuance of a warrant charging defendant with the two felonies for which he was ultimately sentenced. Defendant was arrested on this warrant on 8 May 1970. On 1 June 1970 he was brought for a preliminary hearing before the Mayor's Court of the Town of North Wilkesboro, district courts not yet having been established in Wilkes County. G.S. 7A-131(3). He waived preliminary hearing before the Mayor's Court and agreed to be bound over to the next regular session of Superior Court to be held in Wilkes County. At the time he did this he was indigent and was not represented by counsel. He now contends that his constitutional rights were violated in that he was not represented by counsel when he waived the preliminary hearing. He further contends that because his rights had been violated at that time, Judge Exum committed reversible error when he later refused to permit him to withdraw his pleas of guilty and denied his motion to remand the case for preliminary hearing. We do not agree.

[2] Withdrawal of a plea of guilty after its acceptance by the court is not a matter of right, and a motion to be allowed to do so is addressed to the sound discretion of the trial court. *State*

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*v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135; *State v. Crandall*, 225 N.C. 148, 33 S.E. 2d 861; *State v. Morris*, 2 N.C. App. 611, 163 S.E. 2d 539. On the present record no abuse of discretion on the part of the trial court has been made to appear.

[1, 3, 4] The rule announced in *Coleman v. Alabama*, 399 U.S. 1, 26 L.Ed. 2d 387, 90 S.Ct. 1999, decided by the United States Supreme Court on 22 June 1970, three weeks after defendant here had waived preliminary hearing, is not to be applied retroactively. *State v. Hager*, 12 N.C. App. 90, 182 S.E. 2d 588. Prior to the decision in *Coleman*, the Supreme Court of North Carolina had held in *Gasque v. State*, 271 N.C. 323, 156 S.E. 2d 740, that the waiving of a preliminary hearing by a defendant in a criminal proceeding in this State was not such a "critical stage" of the proceeding as to require the presence of counsel, absent anything in the record to indicate that the defendant was actually prejudiced thereby. In the present case, as in *Gasque*, nothing in the record indicates that defendant was in the slightest degree prejudiced by the fact that he was not represented by counsel when he was brought before the Mayor's Court for preliminary hearing or that he was in any way prejudiced by his action in waiving that hearing. It is true that by G.S. 7A-451, which was enacted by the Legislature in 1969, defendant was entitled to be provided with services of counsel at the time he waived the preliminary hearing in this case, but the failure to accord him this statutory right at that time did not, under the circumstances of this case, as a matter of law require the striking of his subsequently tendered pleas of guilty, made by him while represented by counsel and accepted by the trial court only after conducting a searching inquiry which was fully recorded and which fully supports the court's recorded determination that defendant's pleas were "freely, understandingly and voluntarily" made. Defendant does not contend on this appeal, nor does anything in the record even suggest, that defendant's pleas of guilty were in the slightest degree induced by the fact that he was not accorded his statutory right to the appointment of counsel at the time he was brought before the court for the preliminary hearing or by the fact that he waived such a hearing. What was said by Parker, C.J. in the opinion in *State v. Caldwell*, 269 N.C. 521, 526, 153 S.E. 2d 34, 38, is pertinent here:

"Defendant has not shown that there has been any violation of his fundamental constitutional rights or that he

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was denied the substance of a fair trial in a situation where he was not in a position to protect himself because of ignorance, duress, or other reasons for which he should not be held responsible. The record shows affirmatively that defendant, who was represented by counsel, understood the charges against him, the nature and effect of his pleas of guilty, and the maximum sentences which might lawfully be imposed upon him if he entered such pleas, and that he entered the pleas of guilty to the offenses charged voluntarily, without threats or inducements or promises, and with a full understanding of the effect and possible consequences of such pleas of guilty."

Furthermore, defendant's pleas of guilty, understandingly and voluntarily made at a time when he was fully accorded assistance of counsel, waived constitutional rights, among them the right to trial by jury and the incidents thereof, far more fundamental than were his rights to receive a preliminary hearing or to receive advice of counsel before waiving such a hearing. Appeal from the sentence imposed upon his pleas of guilty, made under the circumstances of this case, presents for review only one question, whether error of law appears on the face of the record proper. *State v. Greer*, 270 N.C. 143, 153 S.E. 2d 849; *State v. Caldwell*, *supra*. None appears on the face of the present record.

[5] Appellant's final assignment of error is that he was denied his constitutional right against self-incrimination when he was required to testify as a witness for the State in the trial of the case of "*State v. Jerry Wayne Bauguess*," in which Bauguess was being tried for the same crimes to which defendant had already pleaded guilty. The Bauguess trial took place in Superior Court held in Wilkes County in June 1971, almost a year after defendant, Richard Rom Elledge, had entered his pleas of guilty, but prior to the time sentence was imposed upon defendant Elledge. Defendant objected to being required to testify in the Bauguess trial on the grounds that his testimony would tend to incriminate him of the same offenses to which he had already pleaded guilty. Judge Exum, presiding at the Bauguess trial, after ascertaining that defendant Elledge had already pleaded guilty, overruled the objection and required Elledge to testify. Defendant then testified, giving a detailed account of the manner

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in which he had committed the crimes, but exonerating Bauguess.

The question presented by appellant's final assignment of error is whether the privilege against self-incrimination ends with a defendant's plea of guilty or continues until after he has been sentenced. On this question we find no controlling decision by the Supreme Court of this State, and authorities elsewhere are divided. See Annotation, 9 A.L.R. 3d 990. However, a careful examination of the record in the case now before us makes abundantly clear that the present appellant was in no way prejudiced by being required to testify. While his testimony comprised a detailed confession of guilt, it placed him in no more heinous light than had his previously entered formal pleas of guilty. The sentence ultimately imposed was certainly not unduly severe, and nothing in the record even tends to suggest that his sentence was in the slightest degree increased because of anything which he said while testifying at the Bauguess trial. While recognizing the logic of those authorities which hold that the privilege against self-incrimination continues until after sentence is imposed, we hold that defendant under the circumstances of this case suffered no prejudice in being required to testify. Accordingly, appellant's final assignment of error is overruled.

[6] We note that the information signed by the solicitor, which contained the charges against defendant and on which he consented to be tried, is referred to in the record as a "presentment." "In this jurisdiction, the accepted definition of the word 'presentment' is as follows: 'A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge or observation, or upon information from others without any bill of indictment, but since the enactment of G.S. 15-137 trials upon presentments have been abolished and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment.'" *State v. Wall*, 271 N.C. 675, 157 S.E. 2d 363. Judge Exum noted the error in nomenclature in the present record and correctly held that, despite this error, the so-called "presentment" in the present case was effective as an information of the solicitor. It fully complied with the requirement of G.S. 15-140.1 that "[t]he information shall contain as full and

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complete a statement of the accusation as would be required in an indictment."

On this appeal we find

No error.

Judges CAMPBELL and MORRIS concur.

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BRENDA WHITE WILLIAMS v. WALTER LEON WILLIAMS

No. 711DC679

(Filed 2 February 1972)

1. Constitutional Law § 24; Jury § 1— right to jury trial — U. S. Constitution

The right to trial by jury guaranteed by the Seventh Amendment to the U. S. Constitution applies only to the federal courts and not to the state courts.

2. Divorce and Alimony §§ 2, 16— alimony without divorce — former requirement of jury trial

In an action for alimony without divorce brought before the repeal of G.S. 50-16, effective 1 October 1967, permanent alimony could not be awarded unless the issues raised by the pleadings were passed upon by the jury.

3. Divorce and Alimony §§ 2, 16— alimony without divorce — waiver of jury trial

Issues of fact in an action for alimony without divorce may now be determined by the judge if a jury trial is waived by failing to make timely demand pursuant to G.S. 1A-1, Rule 38(b), since G.S. 50-16.8 changed the procedure to be followed in actions for alimony without divorce from the divorce procedure set forth in G.S. 50-10 to the procedure applicable to other civil actions.

4. Insane Persons § 10; Rules of Civil Procedure § 17 —incompetent defendant

An incompetent must defend by general or testamentary guardian, if he has one, or by guardian *ad litem*. G.S. 1A-1, Rule 17(b)(2).

5. Insane Persons § 10; Rules of Civil Procedure § 17— duty of judge to determine litigant's competency

Where circumstances arise in the course of a trial which bring into question the competence of a litigant, it is the duty of the trial judge to determine this question before proceeding.

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**6. Insane Persons § 10; Rules of Civil Procedure § 17— failure to determine competency of defendant**

The trial court in this action for alimony without divorce was not required to determine the competency of defendant where defendant did not contend at any time before appeal that he was incompetent, the record shows that defendant has been hospitalized on several occasions for mental disorder but none of those periods were recent, defendant was employed in a responsible position at the time of the trial, and defendant's testimony in his own behalf did not reflect any mental disorder or deficiency.

**7. Insane Persons § 10; Rules of Civil Procedure § 17— competency of defendant — remark of judge after trial**

Remark made by the trial judge after trial, but before judgment was entered, to the effect that defendant needed a guardian was merely an expression of impatience and was not intended as a finding or expression of opinion as to defendant's competency.

**8. Rules of Civil Procedure § 52; Trial § 58 —trial by court without jury — necessity for findings and conclusions**

In cases where the trial judge passes on the facts, he must (1) find the facts on all issues joined on the pleadings, (2) declare the conclusions of law arising on the facts, and (3) enter judgment accordingly. G.S. 1A-1, Rule 52(a).

**9. Divorce and Alimony § 18— award of alimony — failure to find wife is dependent spouse**

Attempted award of alimony to the wife is set aside where the findings of fact and conclusions of law made by the trial judge do not resolve the crucial issue of whether the wife is the dependent spouse and the husband is the supporting spouse, and the judgment contains no adjudication that the wife is entitled to alimony.

**10. Divorce and Alimony § 23— alimony — child support — identification of each allowance**

In cases where alimony or alimony *pendente lite* is allowed and provision is also made for support of minor children, the order must separately state and identify each allowance.

APPEAL by defendant from *Horner, District Judge*, 11 March 1971 Special Session of District Court held in CURRITUCK County.

This appeal is from judgment entered after final hearing by the court without a jury in an action brought by plaintiff wife against her husband for alimony without divorce, custody of minor children, and support and maintenance for minor children.

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The court entered findings of fact and ordered: (1) that custody of the minor children to be awarded plaintiff with defendant to have reasonable privileges of visitation; (2) that defendant pay to plaintiff \$75 a month for support of the children, plus all their medical and dental expenses; and (3) that defendant convey to plaintiff by general warranty deed a one-half undivided interest in the residence and "the acre of ground on which the house now stands."

*No brief filed by plaintiff appellee.*

*E. Ray Etheridge for defendant appellant.*

GRAHAM, Judge.

Defendant did not request a jury trial and made no objection to the court hearing the matter without a jury. He contends now, however, that his rights under the Federal constitution and the State constitution were violated in that he was not afforded a trial by jury.

[1] The Seventh Amendment to the United States Constitution guarantees trial by jury in suits at common law in the United States courts. It is well settled, however, that this provision applies only to the federal courts and not to the state courts. *St. Louis and S.F.R. Co. v. Brown*, 241 U.S. 223, 36 S.Ct. 602, 60 L.Ed. 966; *Person v. Yewdall*, 95 U.S. 294, 24 L.Ed. 436; *Caudle v. Swanson*, 248 N.C. 249, 103 S.E. 2d 357; *Furniture Co. v. Baron*, 243 N.C. 502, 91 S.E. 2d 236.

This case was tried before the effective date of the new North Carolina Constitution which was adopted 3 November 1970 and became effective 1 July 1971. Art. I, § 19 [Art. I, § 25, Const. 1970], Const. 1868 provides that in "all controversies at law respecting property, the ancient mode of trial by jury . . . shall remain sacred and inviolable." Art. IV, § 12 [Art. IV, § 14, Const. 1970], Const. 1868, 1961, provides:

*"Waiver of jury trial.*—In all issues of fact joined in any court, the parties in any civil case may waive the right to have the same determined by a jury; in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury."

Ordinarily, the matter of such waiver is controlled by statute. *Furniture Co. v. Baron*, *supra*. Questions of custody and

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support of minor children are to be heard by the court without a jury, G.S. 50-13.5(h), and defendant does not contend that he had any right to a jury trial with respect to these issues. He contends, however, that he had a right to a jury trial on the issuable facts raised by his wife's action for alimony.

Defendant concedes that he did not demand a jury trial in the manner now required by G.S. 1A-1, Rule 38. Thus, unless an action for alimony without divorce is an action wherein a jury trial cannot be waived, defendant has waived his right of trial by jury. G.S. 7A-196(a); G.S. 1A-1, Rule 38(d).

[2] In an action for alimony without divorce brought before the repeal of G.S. 50-16, effective 1 October 1967, permanent alimony could not be awarded unless the issues raised by the pleadings were passed upon by the jury. *Schloss v. Schloss*, 273 N.C. 266, 160 S.E. 2d 5; *Davis v. Davis*, 269 N.C. 120, 152 S.E. 2d 306; *Schlagel v. Schlagel*, 253 N.C. 787, 117 S.E. 2d 790. This was so because the effect of a decree for alimony rendered under G.S. 50-16 was considered identical to that of a decree of divorce from bed and board rendered pursuant to G.S. 50-7. Consequently, an action under G.S. 50-16 for alimony without divorce was held to be within the purview of a divorce action and governed by the procedure required for divorce actions. The procedure in a divorce action is not the same as the procedure in other civil actions in that the material facts in the complaint are deemed denied, whether actually denied by pleading or not. Also, "no judgment shall be given in favor of the plaintiff . . . until such facts have been found by a jury," except in actions based on a one-year separation, in which instance jury trials may be waived under certain circumstances. G.S. 50-10.

Jurisdiction over the subject matter of divorce is given only by statute. Art. II, § 10, Const. 1868 [modified and continued in Art. II, § 24(1)(m) and 24(4), Const. 1970]; *Schlagel v. Schlagel*, *supra*; *Hodges v. Hodges*, 226 N.C. 570, 39 S.E. 2d 596.

In enacting G.S. 50-16.1 *et seq.*, effective 1 October 1967, the General Assembly included a provision specifying that the procedure to be followed in actions for alimony without divorce is the same as in other civil actions. "The procedure in actions for alimony and actions for alimony pendente lite shall be as in

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other civil actions except as provided in this section." G.S. 50-16.8(a). The exceptions which follow are not pertinent here.

[3] We are of the opinion, and so hold, that in enacting G.S. 50-16.8, the General Assembly changed the procedure to be followed in actions for alimony without divorce from the divorce procedure set forth in G.S. 50-10 to the procedure applicable to *other civil actions*. In *other civil actions*, issues of fact may be determined by the judge if a jury trial is waived by failing to make timely demand pursuant to G.S. 1A-1, Rule 38(b). *Sykes v. Belk*, 278 N.C. 106, 179 S.E. 2d 439. Defendant did not demand a jury trial in accordance with Rule 38(b) and therefore he waived his right to trial by jury.

Defendant assigns as error the failure of the trial judge to appoint a guardian for him, contending that he was incompetent at the time of trial.

[4, 5] An incompetent must defend by general or testamentary guardian, if he has one, or by guardian ad litem. G.S. 1A-1, Rule 17(b) (2). A guardian ad litem may be appointed upon the court's own motion. G.S. 1A-1, Rule 17(c) (4). Where circumstances arise in the course of a trial which bring into question the competence of a litigant, it is the duty of the trial judge to determine this question before proceeding. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E. 2d 163.

[6] Defendant, who was represented by counsel, made no motion at the trial for appointment of a guardian ad litem and did not contend at any time before appeal that he was incompetent. The record reflects that on several occasions defendant has been hospitalized for mental disorder. However, there is no indication that any of these periods were recent. At the time of trial defendant was employed in a responsible position. He testified in his own behalf and nothing in his testimony reflects any mental disorder or deficiency. We do not find in the record any circumstances which would raise a question as to defendant's competency.

[7] In support of this assignment of error defendant stresses a side remark made by the judge after trial, but before judgment was entered. This remark, which was to the effect defendant needed a guardian, was obviously not intended by the judge as a finding or an expression of opinion as to defendant's lack of

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competency. Viewing the remark in the context in which it was made, we interpret it as simply an expression of impatience by the judge, prompted by evidence of various acts by defendant which may reflect ill-will toward his wife, but which do not suggest incompetency.

Through his final assignment of error defendant contends that the facts found by the trial judge do not support the judgment.

[8] In cases where the trial judge passes on the facts, it is necessary that he (1) find the facts on all issues joined on the pleadings, (2) declare the conclusions of law arising on the facts, and (3) enter judgment accordingly. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d 149; G.S. 1A-1, Rule 52(a).

[9, 10] In paragraph nine of her complaint, plaintiff alleges that she is the dependent spouse and defendant is the supporting spouse. In paragraph nine of the answer, defendant denies these allegations. The findings of fact and conclusions of law made by the trial judge make no attempt to resolve these two crucial issues. Furthermore, the judgment contains no conclusion or adjudication that plaintiff is entitled to alimony. In fact, some confusion exists as to whether the portion of the judgment ordering defendant to convey title to a one-half undivided interest in the residence was intended as a provision for alimony or a provision for child support. In cases where either alimony or alimony pendente lite is allowed and provision is also made for support of minor children, the order must separately state and identify each allowance. *Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E. 2d 132; G.S. 50-16.7(a); G.S. 50-13.4(e).

The judgment contains sufficient findings of fact to support the court's award to plaintiff of custody of the minor children and its order that defendant pay \$75 monthly, plus medical and dental expenses, as support for the minor children. These portions of the judgment will not be disturbed. However, the portion of the judgment ordering defendant to transfer to plaintiff title to a one-half undivided interest in the residence, which we interpret as an attempt to award alimony, is stricken and the case is remanded for rehearing on all issues arising with respect to plaintiff's claim for alimony without divorce.

In remanding the case, we deem it appropriate to call attention to G.S. 50-16.7(a), which provides, "alimony or alimony

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pendente lite shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any interest therein, *or a security interest in or possession of real property*, as the court may order." (Emphasis added.) G.S. 50-13.4(e) has an identical provision with respect to payment for the support of a minor child.

Remanded.

Chief Judge MALLARD and Judge HEDRICK concur.

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EULA S. DUDLEY, EMPLOYEE v. DOWNTOWNER MOTOR INN, EMPLOYER; LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER

No. 718IC507

(Filed 2 February 1972)

1. Master and Servant § 73—workmen's compensation—incapacity to perform regular job—total or partial disability

Although there was evidence that plaintiff's injuries incapacitated her to perform certain essential duties of a cook, the only gainful occupation for which she was qualified by work experience, the Industrial Commission did not err in failing to award plaintiff compensation for total incapacity under G.S. 97-29 where the evidence showed that she suffered 55 per cent permanent partial disability of her left hand, G.S. 97-31 being applicable in such case.

2. Master and Servant § 96—workmen's compensation—appellate review of award—questions presented

In passing upon an appeal from an award of the Industrial Commission, the Court of Appeals is limited in its inquiry to the questions of (1) whether there was any competent evidence before the Commission to support its findings and (2) whether such findings justify the Commission's legal conclusions and decisions.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 11 March 1971.

On 19 March 1968 plaintiff sustained an injury by accident arising out of and in the course of her employment. All jurisdictional facts were stipulated, and plaintiff's employer and its insurance carrier admitted liability under the North Carolina Workmen's Compensation Act. On 14 August 1968 the parties entered into an agreement with approval of the Industrial Commission under which plaintiff was paid compensation for

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temporary total disability at the rate of \$42.00 per week for the periods from 15 June 1968 to 23 June 1968 and from 18 July 1968 through 15 August 1969. Hearings were held before Deputy Commissioners on 20 January 1969, 27 April 1970, and 21 August 1970, at which evidence was presented to show the following:

Plaintiff, a 53-year-old woman who had gone to the seventh grade in school, was employed as a cook at the Downtowner Motor Inn in Goldsboro. She had never been employed anywhere except as a cook. On 19 March 1968 her left hand was injured in an accident which the parties stipulated arose out of and in the course of her employment. She continued to work for twelve weeks after the accident, at the end of which time her employment was terminated because she could not handle the job, which required the use of both hands. She has not worked since that time. During 1968 and 1969 she received extensive medical, surgical and hospital treatments for the injuries to her hand, including operations by specialists at Chapel Hill and at Duke University Hospital. The orthopedic surgeon who treated plaintiff at Duke University Hospital testified that he last examined plaintiff on 30 July 1969, at which time he gave her a permanent partial disability rating of 55 percent loss of use of her left hand. This doctor testified:

"It is my opinion that, in view of the involvement of the thumb, the index and long fingers, but since she had a functional ring and little finger, useful wrist, useful palm of the hand, and some limited use of the remaining thumb and index finger, that she have a permanent partial disability of the left hand of 55 per cent. I indicated to her that she could use the hand for whatever acts she was able to do; that she should avoid extreme changes in temperature, such as extreme heat or cold; that she should not depend on hand for primary strength but use it as a helping hand, depending primarily on her right hand.

\* \* \* \* \*

"... The reason I told Mrs. Dudley to avoid extreme temperature cold and hot is that if sensation is not normal, there is greater likelihood of burning or freezing. I told her she should not handle hot objects or cold objects without some protection on hand. This would relate, of course, to any act around the stove where food was cooking."

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Plaintiff testified that she could no longer work as a cook for a living, that she could not lift anything of any weight with her left hand, could not twist a bottle top or jar with it, could not use a can opener, and that any kind of pressure or placing her hand in cold water made her hand hurt.

On 10 September 1970 Deputy Commissioner Robert F. Thomas filed an opinion and award in which he made findings of fact, including finding of fact No. 4 as follows:

"4. As a result of her injury by accident, plaintiff was temporarily totally disabled to July 30, 1969, reached her point of maximum improvement on said date, and has 55 per cent permanent loss of use of her left hand."

Based on his findings of fact, Deputy Commissioner Thomas made the following conclusions of law:

"1. As a result of her injury by accident, plaintiff was temporarily totally disabled to July 30, 1969, and is entitled to compensation at the rate of \$42.00 per week through such date. G.S. 97-29.

"2. As a further result of her injury by accident plaintiff has 55 per cent permanent loss of use of her left hand, which entitled her to compensation at the rate of \$42.00 per week for a period of 93.5 weeks beginning July 31, 1969."

On his findings of fact and on these conclusions of law, the Deputy Commissioner made the following award:

"Defendants shall pay compensation to the plaintiff at the rate of \$42.00 per week through July 30, 1969, for temporary total disability.

"Defendants shall pay compensation to the plaintiff at the rate of \$42.00 per week for a period of 93.5 weeks beginning July 31, 1969, to cover her permanent disability. Provided, that defendants shall be entitled to credit for payments made to the plaintiff from July 31, 1969, to August 15, 1969."

The Deputy Commissioner also directed defendants to pay all medical expenses incurred by plaintiff as a result of her injury and to pay all costs, including all fees of expert witnesses.

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On appeal by plaintiff, the full Commission amended finding of fact No. 4 of the Deputy Commissioner by adding at the end thereof the following:

“Plaintiff has sustained no permanent partial or temporary total disability or other type of disability since July 30, 1969, other than such 55 per cent permanent partial disability of the left hand.”

and amended conclusion of law No. 2 by making substantially the same addition thereto, citing G.S. 97-31(12) and (19). As so amended, the full Commission adopted as its own the opinion and award of the Deputy Commissioner, and from this opinion and award plaintiff appealed.

*Herbert B. Hulse and George F. Taylor for plaintiff appellant.*

*Cockman, Alvis & Aldridge by Jerry S. Alvis for defendant appellees.*

PARKER, Judge.

[1] Appellant contends that since there was evidence to show that her injuries incapacitated her to perform certain essential duties of the only gainful occupation for which she was qualified by prior work experience, the Industrial Commission erred in failing to find this as a fact and in failing to conclude therefrom that she was entitled to receive compensation for *total* incapacity under G.S. 97-29. The evidence in this case, however, makes the following express provisions of G.S. 97-31 controlling:

“In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the *disability shall be deemed to continue for the periods specified, and shall be in lieu of all other compensation*, including disfigurement, to wit:

\* \* \* \* \*

“(12) For the loss of a hand, sixty per centum of the average weekly wages during one hundred and seventy weeks.

\* \* \* \* \*

“(19) . . . The compensation for partial loss of or for partial loss of use of a member . . . shall be such pro-

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portion of the periods of payment above provided for total loss as such partial loss bears to total loss. . . ." (Emphasis added.)

[2] "In passing upon an appeal from an award of the Industrial Commission, this Court is limited in its inquiry to two questions of law, namely: (1) Whether there was any competent evidence before the Commission to support its findings; and (2) whether the findings of fact of the Commission justify its legal conclusions and decisions." *Snead v. Mills, Inc.*, 8 N.C. App. 447, 174 S.E. 2d 699. "In case the findings are insufficient upon which to determine the rights of the parties, the court may remand the proceeding to the Industrial Commission for additional findings," *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649, but "[i]f the findings of fact of the Industrial Commission are supported by competent evidence and are determinative of all the questions at issue in the proceeding, the court must accept such findings as final truth, and merely determine whether or not they justify the legal conclusions and decision of the commission." *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706.

There was here evidence to support the crucial findings of fact made by the Industrial Commission and these findings were determinative of all questions at issue in this case. On these findings G.S. 97-31 became applicable and controlling, and the Commission correctly applied the provisions of that section in making its award in this case.

*Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619, cited by appellant, is not apposite. In that case there was evidence, which is lacking here, tending to show that the plaintiff was totally disabled and incapacitated emotionally and physically to engage in any gainful work as a result of a compensable injury.

The opinion and award appealed from is

Affirmed.

Judges CAMPBELL and MORRIS concur.

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## STATE OF NORTH CAROLINA v. JACK ARNOLD McINTYRE

No. 7216SC76

(Filed 2 February 1972)

**1. Narcotics § 4.5— felonious possession of marijuana — instructions on misdemeanor offense**

Where all the evidence in a felonious possession of marijuana case tended to show that the defendant had in his possession more than one gram of marijuana, and the defendant's evidence tended to show that he did not have any marijuana in his possession, the trial court was not required to charge on the misdemeanor of possession of only one gram or less of marijuana. [former] G.S. 90-111.

**2. Narcotics § 5; Criminal Law § 138— possession of marijuana — punishment — reduction of punishment by legislature**

Defendant was convicted in May 1971 of the felonious possession of more than one gram of marijuana and sentenced to 3-5 years in prison under the then-existing statute. While his appeal was pending, the legislature reduced the maximum term of imprisonment for the possession of marijuana to six months. The legislature also provided that "prosecutions" occurring prior to 1 January 1972 shall not be affected by the statutory changes. *Held*: Defendant was entitled to the reduction of his sentence to six months. G.S. 90-94; G.S. 90-95; G.S. 90-113.7.

ON *certiorari* to review trial by *Canaday, Judge*, May 1971 Session of Superior Court for ROBESON County.

The defendant was charged in a bill of indictment, proper in form, with the felonious possession of 168 grams of the drug marijuana, in violation of G.S. 90-88 (as it existed prior to 1 January 1972).

The evidence for the State tended to show the following: At 2:00 p.m. on 21 March 1971, Robeson County Deputy Sheriff Hubert Stone (Stone) was on duty in the City of Pembroke and had in his possession a warrant to search the defendant's automobile. He observed the defendant driving an automobile, began to follow him, and, when approximately fifty yards behind the defendant, observed "a blue object come out of Jack McIntyre's left hand and come on top of the car." The officer signaled the defendant to stop and then searched the vehicle. He found no narcotic drugs but did find a pistol lying on the seat. The defendant was allowed to depart, but the officer returned to the point where he testified that he had seen the defendant throw "a blue object" and found a blue bank deposit bag in which

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were ten plastic bags containing marijuana wrapped in saran wrap. The defendant was subsequently arrested and fingerprinted, and the bags found by Stone, together with the material contained in them, were sent to the State Bureau of Investigation for fingerprint and chemical analysis.

Mr. M. C. Evans, a chemist for the State Bureau of Investigation Crime Laboratory, whom the court held to be an expert in the fields of chemistry and drug analysis, testified:

“I made a chemical analysis of two portions of the contents of the bags and determined it to be Marijuana. I did not analyze all of the material but by observation, in my opinion one hundred per cent of the brown vegetable material was Marijuana. I determined the weight of the vegetable material to be 74.9 grams.”

In addition, fingerprints found on some of the plastic bags were identified as those of the defendant by the Supervisor of the S.B.I. Identifications Bureau.

The defendant took the stand in his own behalf and testified at one point, “On that afternoon I did not have on my person or in the Toyota any kind of drugs, nor did I throw anything outside of that automobile.”

From a jury verdict of guilty as charged and a judgment of imprisonment of from three to five years, the defendant gave notice of appeal to the Court of Appeals.

*Attorney General Morgan and Associate Attorney Poole for the State.*

*John C. B. Regan III for defendant appellant.*

MALLARD, Chief Judge.

[1] The defendant contends that the trial judge committed error in failing to charge the jury on the lesser included offense of possession of one gram or less of marijuana. (G.S. 90-111, before being rewritten effective 1 January 1972.) All the evidence for the State tended to show that the defendant had in his possession more than one gram of marijuana. The defendant's evidence tended to show that he did not have any marijuana in his possession. There was therefore no evidence of the misdemeanor of possession of only one gram or less of

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marijuana. The trial judge did not commit error in failing to charge the jury on the lesser included offense of the possession of one gram or less of marijuana. The applicable rule is:

“\* \* \* The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State’s evidence tends to show a completed . . . (offense) and there is *no conflicting evidence* relating to the elements of the crime charged. Mere contention that the jury might accept the State’s evidence in part and might reject it in part will not suffice.” *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954); *State v. Gurkin*, 8 N.C. App. 304, 174 S.E. 2d 20 (1970). See also, *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969).

The case of *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970), cited and relied on by defendant, is distinguishable. In *Riera*, the Supreme Court held, among other things, that the *possession* of barbiturates, a misdemeanor, was a lesser included offense in the felony charge of *possession* of barbiturates *for the purpose of sale*. Proof that the defendant possessed 100 or more capsules or tablets of barbiturates, under G.S. 90-113.2 and G.S. 113.8 as they existed at the time *Riera* was decided, merely established for the State a *prima facie* case that the crime of felonious possession for the purpose of sale had been committed. In *Riera*, it is said:

“A *prima facie* case does nothing more than carry the case to the jury for its determination. *Owens v. Kelly*, 240 N.C. 770, 84 S.E. 2d 163. Likewise, *prima facie* evidence is no more than sufficient evidence to establish the vital facts without further proof, if it satisfies the jury. In a criminal case the jury is at full liberty to acquit the defendant if it is not satisfied from all the evidence—including *prima facie* evidence—that defendant’s guilt has been proven beyond a reasonable doubt. In short, the inference or conclusion which may be drawn from certain facts recited in the statute may justify, but not compel, a verdict adverse to the defendant. Ordinarily, the estab-

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lishment of prima facie evidence does not shift the burden of the issue from the State to the defendant. \* \* \*

[2] Under the applicable statutes pertaining to marijuana prior to the effective date of the North Carolina Controlled Substances Act, the quantity possessed actually determined the grade of the offense—the possession of one gram or less being a misdemeanor and the possession of more than a gram of marijuana, in and of itself, being a felony. In the case before us, therefore, the possession of more than one gram of marijuana was a felony, not just prima facie evidence thereof.

On 1 January 1972, and while this case was on appeal to this court, however, the Act of the 1971 General Assembly entitled North Carolina Controlled Substances Act (Act), Article 5, Chapter 90 of the General Statutes, became effective. This cause was argued in the Court of Appeals in January 1972.

Pertinent parts of the Act read as follows:

“§ 90-94. *Schedule VI controlled substances.* \* \* \*

The following controlled substances are included in this schedule:

1. Marihuana.
2. Tetrahydrocannabinols.

§ 90-95. *Violations, penalties.*—(a) Except as authorized by this Article, it shall be unlawful for any person:

- (1) To manufacture, distribute or dispense or possess with intent to distribute a controlled substance listed in any schedule of this Article;

\* \* \*

- (3) To possess a controlled substance included in any schedule of this Article.

\* \* \*

(e) Any person who violates G.S. 90-95(a) (3) with respect to controlled substances included in Schedules V and VI of this Article shall, for the first offense, be guilty of a misdemeanor and be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars (\$500.00). \* \* \*

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(f) Possession by any person of controlled substances included in any schedule of this Article in violation of G.S. 90-95(a) (3) shall be presumed to be possession of substances for purposes of violating G.S. 90-95(a) (1) in the following cases:

\* \* \*

(3) Possession of more than five grams of marijuana as controlled within Schedule VI of this Article

....

\* \* \*

§ 90-113.7. *Pending proceedings.*—(a) Prosecutions for any violation of law occurring prior to January 1, 1972 shall not be affected by these repealers, or amendments, or abated by reason, thereof."

It is noted that the above-quoted portion of G.S. 90-113.7(a) does not now specifically refer to the punishment to be imposed, but the Act does reduce the crime of possession of more than one gram of marijuana from a felony to a misdemeanor, and the maximum punishment for the first offense of possession of any quantity of marijuana to imprisonment for not more than six months. The defendant in this case was found guilty of only the possession of marijuana. While the *prosecution* of the defendant for the violation of the narcotic laws occurring prior to 1 January 1972 was not affected by the 1971 Act, under the principles set forth in *State v. Pardon*, 272 N.C. 72, 157 S.E. 2d 698 (1967) and followed in *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), the reduction of the grade of the crime by the General Assembly, while this case is pending, and the reduction of the maximum punishment for the simple possession of marijuana inures to the benefit of the defendant. The defendant, therefore, has been convicted of only a misdemeanor. The judgment as to the defendant, Jack Arnold McIntyre, is modified so as to reduce his sentence of imprisonment for not less than three years nor more than five years to imprisonment for six months in the custody of the Commissioner of Corrections.

The defendant has other contentions and exceptions which are not discussed herein, but in view of the disposition of this

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case, we hold that the errors complained of, if any, are without merit or are not prejudicial.

Modified and affirmed.

Judges HEDRICK and GRAHAM concur.

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JEANENNE P. OWENS v. GODFREY LEGGETT LITTLE

No. 713DC709

(Filed 2 February 1972)

**Husband and Wife § 11; Divorce and Alimony § 19— action under deed of separation—educational expenses of the child—modification of deed—extent of husband's liability**

In plaintiff's action to recover from her former husband the sum of \$1,321.78 paid by her for the education of their son at a data processing school, the action being brought pursuant to the terms of a 1965 deed of separation providing that the husband pay the educational expenses of the child, the trial court erred in finding that the plaintiff's claim was "barred and estopped" by a 1969 modification of the deed which merely increased the husband's payments to all of his children, since the modification in no way changed the husband's legal obligation to pay for the educational expenses of his son.

**APPEAL** by plaintiff from *Roberts, Chief District Judge*, 12 July 1971 Session of District Court held in PITT County.

This is a civil action wherein plaintiff seeks to recover from her former husband, pursuant to the terms of a deed of separation, \$1,321.78 for sums paid by her for the schooling of their child, Richard Little, at the Raleigh School of Data Processing and for other school, drug, and medical expenses of all four children of the marriage.

The defendant filed answer admitting that he and the plaintiff had entered into a deed of separation but denied that he was indebted to the plaintiff in any amount. The defendant pleaded in bar of plaintiff's claim a judgment dated 5 September 1969 entered in a case entitled "*Jeanenne P. Owens v. Godfrey Leggett Little*" (69CVD839).

At the trial the plaintiff introduced into evidence the deed of separation entered into between the parties dated 10 Novem-

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ber 1965. The plaintiff offered evidence tending to show that after 20 September 1969 she had paid on behalf of Richard Little \$1,321.78 for his educational expenses to the Raleigh School of Data Processing.

The defendant introduced into evidence the pleadings and judgment in the civil action entitled "*Jeanenne P. Owens v. Godfrey Leggett Little*" (69CVD839).

Paragraph three of the deed of separation is as follows:

*"Third:* The party of the first part shall pay to the party of the second part, for the use and benefit of the said children, the sum of Two Hundred and Thirty and no/100 Dollars (\$230.00) per month, beginning December 1, 1965, and continuing until the last child is in college, gainfully employed, or, if neither, until the said last child attains to the age of eighteen (18) years. During said period, furthermore, the party of the first part shall pay all drug, medical, surgical, dental, and hospital bills for said children (covering said payments to the extent possible by insurance with a medical-hospital insurance company licensed to do business in the State of North Carolina). Further, the party of the first part shall pay all school and college expenses for the children, including book fees, rings, pictures, school insurance, school supplies, year book, and school newspaper (if there be one). School expenses shall be those related directly to school and shall not include transportation or payments for extra-curricular activities, other than as specified immediately hereinabove."

Paragraphs of the judgment dated 5 September 1969 which are pertinent to this appeal are as follows:

"That Richard A. Little, now 19 years of age is attending or scheduled to attend some technical school in the State of Virginia for which schooling he will be paid some amount of money and that said minor is therefore, now emancipated.

\* \* \*

That, effective as of September 1, 1969, defendant is to pay into the Office of the Clerk of the Superior Court of Pitt County the sum of TWO HUNDRED SEVENTY FIVE DOLLARS (\$275.00) per month for the support and maintenance

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of said three minor children, payable in two (2) equal installments of ONE HUNDRED THIRTY SEVEN DOLLARS AND FIFTY CENTS (\$137.50) on the first day of each month and on the 15th day of each month."

After hearing, the trial court made the following pertinent finding and conclusion:

"That the separation agreement as set forth in paragraph one of this Judgment is in full force and effect except as modified by the order of Judge Wheeler dated September 5, 1969; and although there was ample evidence the money was spent, the separation agreement as modified bars and estops the claim of plaintiff for the subsequent money spent at the Raleigh School of Data Processing, Inc. on Richard Little who was declared in said September 5, 1969 order to be emancipated, and who is 19 years of age."

Based on its findings, the court entered judgment that plaintiff recover \$90.26 for medical and school expenses and the costs of the action, and further decreed that "the balance of plaintiff's claim is barred and estopped under the facts hereinabove set out."

The plaintiff appealed to the Court of Appeals.

*Gaylord and Singleton by A. Louis Singleton for plaintiff appellant.*

*Wallace, Langley, Barwick & Llewellyn by P. C. Barwick, Jr., for defendant appellee.*

HEDRICK, Judge.

In the record we find the following statement:

"The plaintiff does not now appeal any finding of fact of the judge concerning any other amounts owed so basically the issue is whether or not the Deed of Separation has been modified as provided in paragraph 6 of the judgment. . . ."

Therefore, we do not disturb that part of the judgment decreeing that the plaintiff recover of the defendant \$90.26 and the costs of the action.

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Plaintiff contends that the court erred in finding and concluding that plaintiff's claim for reimbursement from the defendant for \$1,321.78, paid in behalf of Richard Little to the Raleigh School of Data Processing, was barred by the deed of separation as modified by the order of Judge Wheeler dated 5 September 1969.

The plaintiff argues that Judge Wheeler was without authority, in the absence of the consent of the parties, to modify the contractual obligation of the defendant to provide educational expenses for his son, Richard Little.

The defendant contends that the plaintiff sought and obtained the judgment dated 5 September 1969 for the specific purpose of having the funds for the "health, education, and maintenance" of all the children increased over the amounts provided in the deed of separation and that, having accepted the benefits of the judgment, she now ought to be estopped to deny that the father's contractual obligation was modified by the judgment entered 5 September 1969.

In *Rabon v. Ledbetter*, 9 N.C. App. 376, 176 S.E. 2d 372 (1970), Judge Parker, writing for the Court, said:

"While the provisions of a valid separation agreement relating to marital and property rights of the parties cannot be ignored or set aside by the court without the consent of the parties, such agreements 'are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children.' *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73; *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235. No agreement between husband and wife will serve to deprive the courts of their inherent authority to protect the interests and provide for the welfare of infants. Husband and wife 'may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court.' *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487."

We do not think that the wife abrogated the agreement in the deed of separation providing that the father pay educational expenses for Richard Little by bringing the action to enforce the father's legal obligation to provide support and education for his children. The court clearly had authority to increase the pay-

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ments for the support of three children above that provided in the separation agreement for the support of four children. *Goodyear v. Goodyear*, 257 N.C. 374, 126 S.E. 2d 113 (1962). The judgment in no way modified the agreement between the parents relating to the educational expenses of Richard Little. The judgment provided no increased benefits for Richard Little whatsoever. We do not think that it can be said that the wife, by accepting the benefits of the judgment, is now estopped to deny that the judgment modified the terms of the deed of separation pertaining to the father's contractual obligation to provide educational expenses for his son, Richard Little.

Without deciding the legal effect of paragraph four of Judge Wheeler's order, we think it suffices to say that the trial court erred in finding and concluding that plaintiff's claim for \$1,321.78 was "barred and estopped" by the deed of separation as modified by paragraph four of Judge Wheeler's order dated 5 September 1969.

The provisions of a valid deed of separation between parents wherein the father agrees to provide funds for the support and education of his children over and above his common-law obligation to do so are binding and must be construed as any other contractual obligation. *Mullen v. Sawyer*, 277 N.C. 623, 178 S.E. 2d 425 (1971); *Layton v. Layton*, 263 N.C. 453, 139 S.E. 2d 732 (1965); *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964); *Goodyear v. Goodyear*, *supra*.

The rule with respect to the construction of contracts of this nature was quoted by Rodman, J., in *Goodyear v. Goodyear*, *supra*, as follows:

"The general rule is that where the entire contract is in writing and the intention of the parties is to be gathered from it, the effect of the instrument is a question of law, but if the terms of the agreement are equivocal or susceptible of explanation by extrinsic evidence the jury under proper instructions may determine the meaning of the language employed."

In the instant case there has been no construction of the contract between the parties relating to plaintiff's claim for \$1,321.78.

For the trial court's error in decreeing that plaintiff's claim for \$1,321.78 was barred and estopped by the deed of

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separation, as modified by the judgment dated 5 September 1969, the case is remanded to the District Court of Pitt County for a construction of the contract between the parties relating to the educational expenses of Richard Little, and for the court to make findings of fact and proceed as the law requires.

Error and remanded.

Chief Judge MALLARD and Judge GRAHAM concur.

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STATE OF NORTH CAROLINA v. EUGENE JESSIE WRIGHT

No. 7127SC768

(Filed 2 February 1972)

Automobiles § 127— drunken driving — sufficiency of evidence that defendant was the driver

In this prosecution for drunken driving, the State's evidence was sufficient to support a jury finding that defendant was the driver of an automobile where it tended to show that a police officer followed the automobile for some three blocks, that the officer "was right on the bumper of the car" when he pulled it over, that the officer stopped his vehicle about 10 feet behind the automobile, that as the officer approached the automobile defendant got out of it on the driver's side and another person got out on the passenger's side, and that the officer did not see any change of drivers after the automobile stopped as defendant's evidence tended to show.

APPEAL by defendant from *Thornburg, Judge*, 23 August 1971 Session of Superior Court held in CLEVELAND County.

Criminal prosecution for driving a motor vehicle upon a highway within this State while under the influence of intoxicating liquor, a violation of G.S. 20-138. After trial and sentence in the district court, defendant appealed and was tried *de novo* in the superior court. Plea: not guilty.

The State presented the testimony of a police officer of the City of Kings Mountain, who testified: He had known defendant for some eight years. About 1:30 a.m. on 21 January 1971 he observed a Chevrolet automobile heading north on N. C. State Highway 216, commonly called Piedmont Avenue, in Kings Mountain, N. C. He followed this car for some three blocks and the car crossed the white line three or four times.

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At one time it was right in the middle of the road. The officer stopped the car, and was "right on the bumper of the car" when he pulled it over. The officer's car was about ten feet from the Chevrolet and directly behind it. The officer walked up to the Chevrolet, and as he did so defendant got out on the left-hand side, the driver's side, of the car and met the officer about halfway between the Chevrolet and the officer's car. Larry Hord, owner of the Chevrolet, got out of the right-hand side, which is the passenger side, of the car. Defendant had the odor of alcohol on his breath, his speech was incoherent, and he was very belligerent. In the officer's opinion, defendant was under the influence of intoxicating liquor. Defendant was placed under arrest and taken to the police station, where he voluntarily took the breathalyzer test. The test reading was .24 percent of alcohol in the blood.

Defendant testified and denied that he had driven the car on the night he was arrested. He testified: "Larry Hord was driving the automobile and we stopped and we switched. . . . On this occasion both of us had been drinking all day and half that night. He was about as drunk as I was, close to it."

Larry Hord, presented as a witness by defendant, testified that he, not the defendant, drove his car; that when the police car pulled its blue light and siren on, he stopped the car and "threw it out of gear and jumped over and Gene got under the wheel." Hord testified that "[t]he reason I changed drivers was because I had a pocket full of tickets." On cross-examination he testified that he and defendant "had been drinking quite a bit," that he was "so drunk I can't even remember where I was going," and that he was 5 feet and 11 inches tall and weighed 216 pounds.

In rebuttal, the officer testified that he did not see any change of drivers.

Verdict: guilty. From judgment imposing sentence, defendant appealed.

*Attorney General Robert Morgan, Assistant Attorney General William W. Melvin, and Assistant Attorney General William B. Ray for the State.*

*Fred A. Flowers for defendant appellant.*

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State v. Wright

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**PARKER, Judge.**

Appellant assigns error to the denial of his motion for judgment as of nonsuit. He admits that while riding in an automobile being driven on a public highway he was intoxicated, but contends that the evidence was insufficient to support a jury finding he was driving. There is no merit in this contention.

"When a motion is made for a judgment of nonsuit or for a directed verdict of not guilty, the trial judge must determine whether there is substantial evidence of every essential element of the offense. In so far as the duty of the judge is concerned, it is immaterial whether the evidence is direct, circumstantial, or a combination of both. If it is substantial as to all essential elements of the offense, it is the duty of the judge to submit the case to the jury." *State v. Davis*, 246 N.C. 73, 97 S.E. 2d 444. While the State's evidence tending to show that defendant was the driver in this case was circumstantial, it was clearly such as would reasonably lead to that conclusion as a fairly logical and legitimate deduction, and was, in our opinion, stronger than the evidence which was held sufficient in *State v. Haddock*, 254 N.C. 162, 118 S.E. 2d 411. Since there was here substantial evidence of every material element of the offense with which defendant was charged, the case was properly submitted to the jury.

We have reviewed appellant's remaining assignments of error, which relate to the court's charge to the jury, and error sufficiently prejudicial to require a new trial does not appear. All of appellant's assignments of error are overruled.

**No error.**

**Judges CAMPBELL and MORRIS concur.**

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**State v. Davis**

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**STATE OF NORTH CAROLINA v. CHARLES ALLEN DAVIS****No. 717SC760****(Filed 2 February 1972)****1. Criminal Law § 71—testimony as to “scuffle marks”—shorthand statement of fact**

Testimony by a deputy sheriff that he observed “scuffle marks” at the scene of an alleged rape was competent as a shorthand statement of facts observed.

**2. Criminal Law § 77—self-serving declaration**

In this prosecution for rape, evidence sought to be elicited on cross-examination of a State’s witness that defendant had told the witness in the presence of the prosecutrix that he had paid the prosecutrix \$4.00 to have relations with her was properly excluded as a self-serving declaration.

**3. Rape § 6—failure to submit assault with a deadly weapon and assault on a female**

In this rape prosecution, the trial court did not err in failing to instruct the jury on the lesser offenses of assault with a deadly weapon and assault on a female.

**4. Rape § 6; Criminal Law § 168—rape prosecution — error in submitting lesser offense**

Where the uncontradicted evidence tends to show that defendant committed the crime of rape, error committed by the trial court in instructing the jury that it could find defendant guilty of an assault with intent to commit rape was prejudicial to the State and not the defendant.

**APPEAL** by defendant from *Cowper, Judge*, 9 August 1971 Session of Superior Court held in **EDGECOMBE** County.

The defendant was charged in a bill of indictment, proper in form, with the rape of Bessie Lee Brown on 4 July 1971. Upon the defendant’s plea of not guilty, the State offered evidence tending to show that on 4 July 1971 Bessie Lee Brown, eighteen years of age, walked with her two younger sisters to a store near their home in Battleboro, North Carolina. At the store the defendant Charles Allen Davis asked the girls if they would go with him to help push his car. The girls walked with the defendant out of Battleboro in an easterly direction along the old Rocky Mount-Battleboro Road to a wooded area, where the defendant told the girls that a path led to his car. There the girls became frightened and started to run. The defendant caught Bessie Lee Brown and they “tussled.” In the ensuing

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fight the defendant cut Bessie Brown on the neck with a broken pocket knife. He dropped the knife and the witness picked it up and threw it in a ditch under some bushes. Thereafter, the defendant forced her farther into the woods, over a "big ditch," and "way back up there" where he pulled her clothes off and had sexual intercourse with her by force and against her will. The defendant offered no evidence.

The jury found defendant guilty of assault on a female with intent to commit rape. From judgment on the verdict imposing a prison sentence, the defendant appealed.

*Attorney General Robert Morgan and Assistant Attorney General Russell G. Walker, Jr., for the State.*

*H. Vinson Bridgers for defendant appellant.*

HEDRICK, Judge.

[1] Defendant contends it was error for the court to permit Deputy Sheriff Tom Moore to state that he observed "scuffle marks" at the alleged scene of the rape. "An observer may testify to common appearances, facts and conditions in language which is descriptive of facts observed so as to enable one not an eyewitness to form an accurate judgment in regard thereto." *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). Although the words "scuffle marks" are in the nature of a conclusion, it was competent as a shorthand statement of the facts observed. *State v. Nichols*, 268 N.C. 152, 150 S.E. 2d 21 (1966). This assignment of error has no merit.

[2] The defendant next contends that the court erred by not allowing Deputy Sheriff Moore to answer on cross-examination the following question: "Didn't the defendant, when you had him and Bessie Brown together, state to you and to Bessie Brown that he paid her \$4.00 to have relations with her?" We think the objection to the question was properly sustained for it clearly solicited a self-serving declaration allegedly made by defendant. *State v. Patton*, 5 N.C. App. 164, 167 S.E. 2d 821 (1969); *State v. Chapman*, 221 N.C. 157, 19 S.E. 2d 250 (1942).

[3] The defendant's contention that the court committed prejudicial error by not instructing the jury that it could find the defendant guilty of assault with a deadly weapon or an assault on a female is without merit. There is evidence tending

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to show that the defendant cut Bessie Brown on the neck with his pocket knife, but it is clear that this occurred at a time and place removed from the crime charged in the bill of indictment. The defendant could have been but was not charged with assaulting Bessie Brown with a deadly weapon; to wit, a knife. Considering the bill of indictment and the evidence in this case, the trial court did not commit error in not instructing the jury that it could find the defendant guilty of assault with a deadly weapon. *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967).

Where the uncontradicted evidence tends to show that the defendant committed the crime charged in the bill of indictment, the trial judge does not commit prejudicial error when he fails to instruct the jury that it can convict the defendant of a lesser offense of that charged in the bill of indictment. *State v. Murry*, 277 N.C. 197, 176 S.E. 2d 738 (1970); *State v. McNeil*, 277 N.C. 162, 176 S.E. 2d 732 (1970); *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Jones*, 249 N.C. 134, 105 S.E. 2d 513 (1958); *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954).

[4] In the present case the uncontradicted evidence tends to show that the defendant committed the crime of rape. Any error committed by the trial judge in instructing the jury that it could find the defendant guilty of an assault with intent to commit rape was prejudicial to the State, and not to the defendant. *State v. Fletcher*, 264 N.C. 482, 141 S.E. 2d 873 (1965).

We hold that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge GRAHAM concur.

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Sweet v. Martin

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JAMES L. SWEET, T/A SWEET CONSTRUCTION COMPANY v.  
O. RAY MARTIN, ET UX, ET AL

No. 7221DC89

(Filed 2 February 1972)

1. Appeal and Error § 28— general exception to findings and judgment —  
appellate review

A general exception to the judgment and a broadside assignment of error that the court erred in entering the findings of fact and signing the judgment do not bring up for review the findings of fact or the evidence on which they are based.

2. Appeal and Error §§ 27, 30— exceptions to evidence and failure to direct verdict — failure to except to findings of fact

In the absence of proper exceptions to the findings of fact, exceptions to the admission of evidence and exceptions to the denial of appellant's motions for a directed verdict are ineffectual.

3. Appeal and Error § 26— exception to signing of judgment

An exception to the signing of the judgment presents for review the single question of whether the facts found support the judgment.

APPEAL by defendants from *Henderson, District Court Judge*, 14 June 1971 Session of FORSYTH County District Court.

This action was instituted by plaintiff to recover on an alleged breach of contract or, in the alternative, to recover the reasonable value of labor and materials furnished in making improvements to defendant owners' home. Defendants denied the breach and counterclaimed for damages for breach of contract alleging that plaintiff provided substandard materials and erected substandard improvements in violation of the Building Code of the City of Winston-Salem.

The parties waived trial by jury and presented evidence supporting their contentions. From judgment in favor of plaintiff in the amount of \$2,014.50, defendants appealed.

*Roberts, Frye & Booth by Leslie G. Frye for plaintiff appellee.*

*Green, Teeter & Parrish by W. Douglas Parrish for defendant appellants.*

BRITT, Judge.

Defendants entered no exception to either of the numerous findings of fact made by the trial court and set forth in the

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judgment; their sole exception pertaining to the judgment is to the signing of the judgment. Exceptions 1, 2, 4 and 5 relate to the competency of certain evidence admitted or excluded at the trial; exceptions 3 and 6 relate to the failure of the trial court to grant defendants' motions for directed verdict made at the conclusion of plaintiff's evidence and renewed at the close of all the evidence.

[1, 2] A general exception to the judgment and an assignment of error that the court erred in entering the findings of fact and signing the judgment is a broadside assignment of error and does not bring up for review the findings of fact or the evidence on which they are based. *Merrell v. Jenkins*, 242 N.C. 636, 89 S.E. 2d 242 (1955) and cases therein cited. In *Burnsville v. Boone*, 231 N.C. 577, 580, 58 S.E. 2d 351, 354 (1950), the Supreme Court said: "Moreover, in the absence of \* \* \* proper exception to the findings of fact, of which defendants complain, exceptions to the admission of evidence, taken during the course of the hearing before the trial judge, as well as the exceptions taken by defendants to the rulings of the judge in denying their motions for judgment as of nonsuit, and assigned as error, are ineffectual. *Smith v. Davis*, 228 N.C. 172, 45 S.E. 2d 51; *Mfg. Co. v. Arnold*, 228 N.C. 375, 45 S.E. 2d 577." The assignments of error based on exceptions 1, 2, 3, 4, 5 and 6 are overruled.

[3] By their exception number 7, defendants except to the signing of the judgment. This exception presents for review the single question as to whether the facts found support the judgment. *Merrell v. Jenkins*, *supra*. We hold that the findings of fact amply support the judgment entered by the trial court.

The judgment appealed from is

Affirmed.

Judges BROCK and VAUGHN concur.

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State v. Walters

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STATE OF NORTH CAROLINA v. GEORGE HERMAN WALTERS

No. 7112SC700

(Filed 2 February 1972)

**1. Appeal and Error § 45— contention not supported by exception or assignment of error**

A contention in the brief not based on any exception or assignment of error will not be considered. Court of Appeals Rule 19(c).

**2. Appeal and Error § 45— failure of brief to refer to exceptions, assignments of error and page numbers**

Appeal is subject to dismissal where defendant's brief contains no reference to his exceptions or assignments of error or to the page of the record where may be found the exception or assignment of error upon which he bases his argument as required by Court of Appeals Rule 28.

**3. Searches and Seizures § 3— search warrant for heroin — validity**

The trial court properly ruled that heroin was seized pursuant to a lawfully obtained search warrant.

APPEAL by defendant from *Bailey, Judge*, 14 June 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was charged in a bill of indictment with the felony of possessing a quantity of narcotic drugs, to wit: heroin. Defendant pleaded not guilty, the jury found him guilty, and judgment was entered imposing a five-year prison sentence. Defendant appealed.

*Attorney General Morgan, by Assistant Attorney General Weathers, for the State.*

*Berry and Berry, by Doran J. Berry, for defendant appellant.*

MORRIS, Judge.

[1] Appellant assigns as error the failure of the trial court to allow him an opportunity to offer evidence on voir dire examination and the failure of the court to make findings of fact or conclusions of law after conducting the voir dire examination. The record contains no objections nor exceptions nor does the record indicate in any manner that these purported errors of the court are assigned as error. A contention in the brief not based on any exception or assignment of error will not be considered.

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*State v. Walters*

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1 Strong, N. C. Index 2d, Appeal and Error, § 45; Rule 19(c), Rules of Practice in the Court of Appeals of North Carolina.

[2] Defendant purports to list 23 assignments of error in the record. There is nowhere in defendant's brief any reference to his exceptions or assignments of error nor any reference to the page of the record where may be found the exception or assignment of error upon which he bases his argument as required by Rule 28, Rules of Practice in the Court of Appeals of North Carolina. See also 1 Strong, N. C. Index 2d, Appeal and Error, § 45. Although it is almost impossible to determine which of defendant's purported exceptions and assignments of error are argued in the brief, we have concluded that no argument is contained in the brief with respect to those numbered 3, 4, 6, 7, 8, 9, 10, 11, 15 and 16. These are, of course, deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. The appeal is subject to dismissal and is dismissed for failure to comply with the Rules of Practice. Rule 48, Rules of Practice in the Court of Appeals of North Carolina.

[3] Nevertheless, we have carefully considered the entire record and find no prejudicial error. Applying principles set forth in *State v. Shirley*, 12 N.C. App. 440, 183 S.E. 2d 880 (1971), cert. denied 279 N.C. 729 (1971), the trial court properly ruled that the evidence was seized pursuant to a lawfully obtained search warrant, and there was no error in the court's overruling defendant's motion to suppress the evidence.

Appeal dismissed.

Judges CAMPBELL and PARKER concur.

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**State v. Sallie**

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**STATE OF NORTH CAROLINA v. DANNY L. SALLIE**

No. 7112SC694

(Filed 23 February 1972)

**1. Criminal Law § 105—nonsuit motion at end of State's evidence—waiver—introduction of evidence**

By introducing evidence, defendant waived his motion for nonsuit made at the close of the State's evidence. G.S. 15-173.

**2. Criminal Law § 104—motion for nonsuit—consideration of defendant's evidence**

On motion for nonsuit in a criminal case, defendant's evidence, unless favorable to the State, is not to be considered; however, when not in conflict with the State's evidence, it may be used to explain or clarify that offered by the State.

**3. Homicide § 21—death of three-year-old child—blow to abdomen—sufficiency of evidence of defendant's guilt**

The evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder of a three-year-old child where it tends to show that the child died as a result of receiving a severe blow on her abdomen, that the blow was received at a time when defendant and the child were alone together in a house trailer which had been jointly rented by defendant and the child's mother, that the blow causing death left a bruise mark on the child's abdomen which closely approximated the size and shape of the heel of a man's boot, that defendant was in military service and was wearing boots, that there were other bruises and cuts on the head and body which occurred close to or at the time of death, that the child had been horribly abused over a period of time prior to her death and that such abuse did not commence until defendant started living in the trailer with the child's mother.

**4. Criminal Law § 172; Homicide § 25—submission of first degree murder—harmless error**

Conviction of second degree murder rendered harmless error, if any, in submitting to the jury the question of defendant's guilt of first degree murder, absent some showing that the verdict of guilty of second degree murder was affected by the submission of the greater offense.

**5. Homicide § 20—photographs of victim's body**

The trial court did not err in the admission of thirteen color photographs of the body of a three-year-old child for the purpose of illustrating a pathologist's testimony as to cuts and bruises found on the child's body.

**6. Criminal Law § 162—instructions to disregard testimony—sufficiency**

In this prosecution for murder of a three-year-old child wherein defendant objected to and moved to strike a pathologist's testimony that a bruise on the child's abdomen "is reminiscent of a heel mark,"

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**State v. Sallie**

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the trial court's instruction to the jury that "you may disregard what caused the bruise" was sufficient to apprise the jury that they were not to regard the witness' testimony as an expression of an expert opinion that the bruise had in fact been produced by a blow from a heel, although it may have been preferable for the court to have given the jury a more positive instruction.

**7. Homicide § 26—instructions on second degree murder—assault with hands or fists on three-year-old child**

The trial court did not err in instructing the jury that they might find defendant guilty of second degree murder if they found from the evidence and beyond a reasonable doubt that defendant intentionally assaulted the three-year-old decedent "with his hands, fist, or feet, which were then used as deadly weapons," and that her death was a proximate result of his acts.

**8. Homicide § 14—assault with hands or feet—presumption of malice**

If death ensues from an attack made with the hands or feet on a person of mature years and full health and strength, the law does not imply malice required to make the homicide second degree murder, but malice is implied where such an assault is committed upon an infant of tender years or upon a person enfeebled by age, sickness or other apparent physical disability.

APPEAL by defendant from *Bailey, Judge*, 31 May 1971 Session of Superior Court held in CUMBERLAND County.

Defendant was indicted for the first-degree murder of Pamela LeGros. He pleaded not guilty. The State's evidence showed:

Pamela LeGros, a little three-year-old girl who weighed 35 to 40 pounds, died on 17 July 1970. The pathologist who performed the autopsy testified that the immediate cause of death was a rupture of the liver and an extensive rupture of the heart, that these occurred almost simultaneously, and that his opinion was that "a rather strong blow" in the region of the abdomen over the liver could have ruptured the liver and forced such pressure back up in the area of the heart as to cause the rupture of the heart. It was the pathologist's opinion that the blow "could have resulted from the child falling, but it would have required excessive distance" and that it also would have required that she land on "a blunt object of some sort." The only wounds he had seen of this type had been the result of falls from a very high distance. There was a semicircular bruise on the child's abdomen just above the navel and approximately over the liver. In the pathologist's opinion the blow which caused this semicircular bruise was the same blow which ruptured the internal organs and caused death.

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State v. Sallie

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The pathologist testified there was a rupture of the spleen, which was probably of one or two weeks' duration, and that he found 85 to 100 bruises on the child's body. Some of these were on her head and the remainder were on her trunk and extremities. The bruises ranged in size from those just barely visible to some which were approximately the size of a silver dollar, and some merged together, making them difficult to count. The bruises ranged from those of very recent age to those of a few days' age. In addition, there were three cuts on her head, each approximately a half inch in length. The cuts on the top and on the side of her head had scabs on them, which indicated they were of several hours to a few days' age. The cut on the back of the head showed some bleeding, and in the opinion of the pathologist occurred very close to or at the time of death. The distribution of the bruises showed "a kick mark on the head and the majority of it." On the left arm there were two circular pinch-type bruises which the pathologist described as "a human bite mark."

A doctor who had examined Pamela on 25 June 1970, approximately three weeks prior to her death, testified that "at that time she was covered with multiple bruises and traumas, including a very large one on her arm, one on her trunk of various sizes, some the size of a nickel and then some the size of a half dollar." These bruises were of various ages, from one day to three to four weeks. This doctor did not perform a complete physical examination, but examined the child from the waist up and prescribed an iron and worm medicine.

The State's evidence also showed: On 17 July 1970 Pamela lived with her mother and her eleven-year-old sister, Lynda, in a trailer on Lot 117 in Dreamland Trailer Park in the City of Fayetteville. Pamela's mother and father, James LeGros, were separated. In April 1970 the manager of the trailer park had rented Lot 117 to the defendant, Danny L. Sallie, and to Pamela's mother, who represented themselves to be Mr. and Mrs. Danny L. LeGros. Pamela's mother worked as office manager at Albert Love Enterprises at Fort Bragg, and defendant was a Specialist Fourth Class in military service. Defendant had a room at Fort Bragg, but most of the time lived in the trailer with Mrs. LeGros, Pamela, and Lynda.

About 7:30 a.m. on 17 July 1970 defendant and two individuals from his military unit came to the trailer and took

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Pamela's mother to Womack Army Hospital, where she had an appointment with a doctor. At that time Lynda and Pamela were left alone in the trailer. Later, about 10:00 o'clock, defendant picked up Pamela's mother at the hospital and took her to Love Enterprises, saying that he was going back to his company and, when he could, would go back to the trailer and pick up Pamela, take her to the baby-sitter's house, and take Lynda swimming. About 10:00 o'clock a lady who lived on Lot 216 in the trailer park saw Lynda and Pamela. Pamela was pale at that time and had on a white sweater which was too big for her. About 11:30, another neighbor, who lived at Lot 118 in the trailer park, observed Pamela standing alone in the yard, dressed in a long, white sweater.

Lynda LeGros, who was twelve years old at the time of the trial, testified that she got up about 6:30 in the morning on 17 July 1970, and remembered defendant coming in and leaving with her mother. The record on this appeal contains the following narration of Lynda's testimony:

"That after Danny and her mother left she and Pamela were left in the trailer. That Danny came back some time after 11:30, between 11:30 and twelve and she and Pamela were still in the trailer. That she and Pamela had been outside of the trailer earlier in the morning, playing in the yard. That they had not been playing with any other boys or girls that morning. That when Danny came back Pamela and she were on the floor and that Pamela was alright at that time. That she was planning to go to the store and then to Howard Beach but Pamela was not going. That she did leave and go to the store and was gone about ten minutes at the longest, or about four or five minutes. That when she left there was no one else in the trailer other than Danny and Pamela. When she came back Danny and Pamela were in the trailer. That she did not see anyone else in or about the trailer at that time."

The manager of the trailer park testified that between 12:00 and 1:00 o'clock on 17 July 1970 she went to the trailer on Lot 117 in response to a phone call. About fifteen or twenty minutes before receiving the phone call, she had seen Lynda LeGros going across the street in the direction of the 7-11 Store, which was located about two blocks from Lot 117. When the manager reached the trailer, she found the door standing wide

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open, water running all over the floor, and the television going full blast. She went inside the trailer, down the hallway into the bathroom, and turned off the water faucet in the tub. She was unable to turn off the television and walked out without touching anything else in the trailer. The manager did not see anyone go in or out of the trailer from the time she left it until she returned to the trailer with a police officer.

Two police officers, who examined the trailer about 2:30 p.m., testified that they found "a complete shambles as far as arrangement of furniture and clothing." In the living room there was a sofa, a coffee table in front of the sofa, on which there was a basket and a white knit sweater, an ironing board with an iron on top of it, a small table, and a trash can. (The neighbor who had seen Pamela standing alone in the yard at about 11:30 a.m., identified the sweater found on the coffee table from a picture taken by the officers as the sweater which she had seen Pamela wearing that morning.) There were stains on the sofa. Shoes and articles of clothing were strewn about the floor in the hallway, the bedroom, and the bathroom of the trailer, and water was standing on the bathroom floor.

The operator of a service station adjoining the trailer park testified that a little after 2:00 p.m. defendant pulled up in front of the service station and had a little girl in his arms. The defendant came into the station. The little girl appeared to be unconscious. Defendant wanted to know what to do with the child, and the operator told him the best thing to do was to take the child to the hospital. The operator saw another girl, who was across from the service station at the 7-11 Store. Defendant called her and she came and got in the car with him. Defendant drove off in the direction of Fort Bragg. Defendant was upset.

The operator of a second service station located about a quarter of a mile farther down the road toward Fort Bragg, testified that he saw defendant on 17 July 1970 "somewhere in the vicinity of twelve or one-thirty p.m." At that time defendant drove up in a car and jumped out with a little girl in his arms. The girl had turned blue and "appeared like a drowned person." Defendant asked the witness if he knew anything about children. The witness put his ear to the chest of the little girl and couldn't hear anything, and told defendant the best thing he could do was to get her to a hospital. "Defendant grabbed

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her and shook her as if trying to revive her" and got in the car and left. Another little girl was with him.

A lady who had baby-sat for Pamela for five or six months ending in January 1970, testified that during that time and ever since she had known Pamela "she was a tiny child with little bones and a pale complexion but had no marks or injuries on her." A lady who knew defendant and Pamela's mother testified that on 29 May 1970 they had brought Pamela to her home to give a birthday gift to the witness' daughter. This witness testified that "at that time, on the 29th May, Pamela LeGros was terribly bruised and had a bad bite mark on her forearm and indentations of old bite marks on her upper arm." The witness inquired how the child had received these, and "the defendant stated Pamela had done something wrong and he was going to correct her and that she was running from him and had run into a wall at the end of the trailer." Dorothy LeGros had asked to be told again how the child was injured at that time and "Danny told her that he had related the story over and over again and wasn't going to say anything further; . . . a conversation was held further concerning the bite marks and Dorothy said Danny had bit her playing with her and Danny said he was not playing with her, that she had bitten him and he bit her back to teach her not to bite."

Defendant testified on direct examination in substance as follows: During July 1970 he stayed some nights at the trailer and contributed financially to the support of Dorothy LeGros and her two daughters. About 6:30 or 7:00 in the morning of 17 July 1970 he went to the trailer, accompanied by two individuals from his military unit. He found Dorothy, Lynda and Pamela in the back bedroom asleep. About 8:00 o'clock he left the trailer with Dorothy LeGros, leaving Pamela and Lynda behind. He returned to the trailer some time after 11:00 o'clock and found Lynda and Pamela there. Pamela was sitting beside the door extremely dirty. She had on a large white sweater, and he told her to get on the couch. He gave Lynda some change from his pocket and told her to go get something for lunch. Lynda went out but came back in because she decided she did not have enough money to buy food at the store. Defendant had taken one of his boots off and had taken his shirt off. He went into the bathroom, leaving Lynda standing with her sister, and started running water in the tub to get Pamela cleaned up. He

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then took his other boot off in the bathroom. "That he was in the bathroom perhaps a minute to a minute and a half, the time of which he is not sure. That Lynda then hollered and he went back in the front room and found Pamela lying between the coffee table and the couch. That he picked Pamela up and layed her down and she was foaming at the mouth. That he then picked Pamela up and went to the car because he was scared." Defendant testified that Lynda had been at the trailer when he left and accompanied him to the two filling stations; that he left the second filling station and went straight to Womack Army Hospital, where he pulled up in front of the building and a medic came out and took the little girl into the emergency room. Defendant testified that he had never beat, kicked or stomped Pamela, and considered himself, during that period of time, to be responsible as a father to both children.

On cross-examination defendant testified that prior to 17 July 1970 Pamela did have bruises. She played with kids in and about the trailer, and some of them were much older than Pamela. Around the end of May he had had occasion to caution two boys in particular about being rough with her. He had bitten Pamela once on the arm and he was playing with her. Pamela had received an injury on the back of her head during a trip with him and several other children in a car. He did not know how she received the bruise which she had on the side of her face at the time of her death, or the bruise on her arm. Defendant testified that he had spoken to two detectives about the events of 17 July, and the best he could recall he told them that he was in the back running the tub when he heard a sound coming from the living room area and rushed out and found Pamela lying face up with an iron lying beside her. He testified that he did not pick the iron up and put it back on the ironing board.

In rebuttal, the State called as a witness one of the detectives with whom defendant had talked. This witness testified that on 26 September 1970 he had shown defendant some pictures of Pamela, and that the only bruises defendant could identify were the ones on the right side of her face. Defendant stated these came from a car accident, when he stopped the car very fast and Pamela hit her face on the dash; that defendant had told the witness this accident had occurred prior to 25 June.

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The jury found defendant guilty of murder in the second degree. From judgment imposing a prison sentence for a term of thirty years, defendant appealed.

*Attorney General Robert Morgan by Assistant Attorney General Millard R. Rich, Jr., for the State.*

*Gary E. Conn and Assistant Public Defender William S. Geimer for defendant appellant.*

PARKER, Judge.

[1, 2] Appellant assigns error to the denial of his motions for nonsuit. By introducing evidence, defendant waived his first motion, which was made at the close of the State's evidence. G.S. 15-173; *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476. On this appeal, therefore, we consider only defendant's second motion, made at the close of all the evidence. This brings in question the sufficiency of all the evidence to take the case to the jury. In determining this question, we apply the well-established rules that on motion for nonsuit in a criminal case the evidence must be considered in the light most favorable to the State, the State is entitled to every reasonable inference which may legitimately be drawn from the evidence, and defendant's evidence, unless favorable to the State, is not to be considered. However, when not in conflict with the State's evidence, defendant's evidence may be used to explain or clarify the evidence offered by the State. *State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862. "Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve, and do not warrant nonsuit." 2 Strong, N.C. Index 2d, Criminal Law, § 104, p. 649.

When viewed in the light most favorable to the State, the evidence in this case would establish the following: Pamela LeGros, a frail little three-year-old girl, died on 17 July 1970 as result of receiving a severe blow on her abdomen. The blow was of such force as to cause an immediate and simultaneous rupture of her heart and liver. The blow was received at a time when Pamela and defendant, a grown man in military service, were alone together in a house trailer which had been jointly rented by defendant and Pamela's mother. The only real question for the jury was whether defendant struck the blow, as the State contends, or the blow resulted from an accidental fall, as defendant contends. In our opinion the evidence, when

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viewed in accordance with the rules above set forth, was sufficient to support a jury finding that defendant struck the blow.

There was evidence that the blow which caused death was the same blow which left a semicircular bruise mark on the child's abdomen; the pathologist testified that in his opinion this was so. The size and shape of this semicircular bruise mark closely approximated the size and shape of the heel of a man's boot. There were numerous other bruise marks distributed over the child's entire body, some of which were of very recent origin. The pathologist testified that the distribution of these bruises showed "a kick mark on the head and the majority of it." There was a fresh cut on the back of the head, which occurred very close to or at the time of death. There were pinch-type bruises, described by the pathologist as "a human bite mark," on the child's arm. There was evidence from which the jury could find that the child had been horribly abused over a period of time prior to death. There was evidence that this abuse did not commence until about the time defendant started living in the trailer with Pamela's mother.

[3] While it is difficult to comprehend how any man, however brutal, could commit acts of such unrestrained savagery upon a frail and helpless child as the evidence in this case indicates, the nature and extent of the multiple injuries inflicted on little Pamela's body at or about the time she received the blow which caused her death were not such as would normally have resulted from a single accidental fall occurring while she played in the living room of her mother's house trailer. Rather, her wounds furnish mute but eloquent testimony that they may have been caused by a sustained, savage, and intentional attack, during the course of which the death blow was delivered. When all circumstances warranted by the evidence are considered together and when the State is given the benefit of all legitimate inferences which may reasonably be drawn therefrom, we find in this case substantial evidence of every essential element of the crime of second-degree murder of which defendant was found guilty. This was all that was required to justify submitting the case to the jury. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431. It was for the jury to determine whether guilt was established beyond a reasonable doubt.

[4] Defendant contends that in any event there was no evidence of premeditation and deliberation and therefore it was

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error to submit an issue as to his guilt of first-degree murder. While the elements of premeditation and deliberation necessary for first-degree murder may be inferred in some cases from evidence of the vicious and brutal nature of a homicide, *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393, it is not necessary for us to decide whether the circumstances disclosed by the evidence in the present case were sufficient for that purpose. Here, the jury acquitted defendant of the capital felony. Conviction of murder in the second degree rendered harmless any error, if any was committed, in submitting to the jury the question of defendant's guilt of the more serious offense, at least absent some showing that the verdict of guilty of the lesser offense was affected thereby. *State v. Casper*, 256 N.C. 99, 122 S.E. 2d 805; *State v. DeMai*, 227 N.C. 657, 44 S.E. 2d 218; *State v. Keyes*, 8 N.C. App. 677, 175 S.E. 2d 357. Defendant has not shown that his conviction was affected in any way by the jury's consideration of his possible guilt of the more serious charge.

[5] During the testimony of the pathologist, the witness identified fourteen color photographs as correctly and accurately representing the body of Pamela LeGros as it appeared on 18 July 1970 when he performed the autopsy. The court excluded one of these, but over defendant's objection permitted the jury to see the remaining thirteen. In this there was no error. Defendant does not contend the photographs are inaccurate or were not properly taken and authenticated, and he admits that some of them were relevant. His contention is that others were irrelevant because "completely unrelated" to the cause of death and that the trial judge abused his discretion by permitting the the jury to see so many inflammatory and gruesome pictures. We do not agree. While the immediate cause of death may have been the result of a single severe blow to the child's abdomen, as the pathologist testified was his opinion, the condition of the child's entire body was relevant to the only real question before the jury, namely, under what circumstances and by what means did the child receive the fatal blow. "Ordinarily, a witness may use photographs to explain or illustrate anything which it is competent for him to describe in words, *State v. Atkinson, supra* (275 N.C. 288, 167 S.E. 2d 241); *State v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824, and if a photograph is relevant and material, the fact that it is gory or gruesome will not alone render it inadmissible." *State v. Chance*, 279 N.C. 643, 654, 185 S.E.

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2d 227, 234. In the present case the photographs were used by the pathologist to illustrate his testimony. They served to make that testimony more intelligible to the jury. The trial judge instructed the jury that they were for purposes of illustration and were not substantive evidence. Each picture which the jury viewed was relevant and served a useful and proper purpose. There was no error in permitting the jury to see them.

[6] The record discloses that during the direct examination of the pathologist and immediately after the witness had described the semicircular bruise on the child's abdomen, the following occurred:

"Q. Can you determine the cause of the bruise that you described there, Doctor?

A. I can't specifically, but it is reminiscent of a heel mark.

Objection by Attorney Geimer, with motion to strike.

Court: Well, are you testifying out of your own personal experience or are you just sort of making a surmise?

A. Well, it looks like a heel mark but that is purely a surmise.

Court: All right, Ladies and Gentlemen, you may disregard what caused the bruise."

Defendant noted an exception to the foregoing and on this appeal contends that the trial judge committed prejudicial error entitling him to a new trial in failing to order the doctor's answer stricken and in failing to instruct the jury unequivocally that they must disregard it. We do not agree. It was clearly competent for the doctor to describe to the jury the shape and appearance of the bruise marks which he found on the child's body and to illustrate his testimony by use of the properly authenticated pictures. The jury had already heard this testimony and had seen the pictures showing the bruise in question. While it may have been preferable for the trial judge to have couched his instruction to the jury in more positive terms, it seems clear to us from the instruction as given that the jury understood that they were not to regard the doctor's answer as any expression of an expert opinion on his part that the bruise had in fact actually been produced by a blow from

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a heel. On the contrary, it is clear that the jury understood that they were free to make their own determination from all of the evidence as to the manner in which the child's injuries had been received. Moreover, in other portions of his testimony the doctor, without objection as far as the record before us discloses, was permitted to describe other marks on the child's body as "a kick mark on the head and the majority of it" and as "a human bite mark." In view of this testimony, as to which defendant apparently interposed no objections, it hardly seems possible that the jury's verdict could have been affected by the trial judge's failure to express in a more positive manner his ruling on defendant's motion to strike. Harmless error not affecting the outcome of the trial does not warrant a new trial.

[7] Appellant assigns error to portions of the court's charge to the jury. In particular, by assignment of error based on Exception No. 19, appellant contends error was committed when the court instructed the jury that they might find defendant guilty of second-degree murder if they found from the evidence and beyond a reasonable doubt that defendant "intentionally assaulted Pamela LeGros with his hands, fist, or feet, which were then used as deadly weapons," and that her death was a proximate result of his acts. Under the circumstances of this case the instruction was proper. The instruction does not assume facts not in evidence. There was competent evidence from which the jury might find that defendant had assaulted the deceased "with his hands, fist, or feet," and the instruction properly leaves it to the jury to determine whether he in fact did so and, if so, whether his hands, fist, or feet "were then used as deadly weapons."

[8] It is true that ordinarily if death ensues from an attack made with hands and feet only, on a person of mature years and full health and strength, the law would not imply malice required to make the homicide second-degree murder. This is so because, ordinarily, death would not be caused by use of such means. The inference would be quite different, however, if the same assault were committed upon an infant of tender years or upon a person enfeebled by old age, sickness, or other apparent physical disability.

As long ago as 1859, Ruffin, J., speaking for our Supreme Court in *State v. West*, 51 N.C. 505, at 509, said:

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"An instrument, too, may be deadly or not, according to the mode of using it or the subject on which it is used. For example, in a fight between men the fist or foot would not generally be regarded as endangering life or limb. *But it is manifest that a wilful blow with the fist of a strong man on the head of an infant, or the stamping on its chest, producing death, would import malice, from the nature of the injury likely to ensue.*" (Emphasis added.)

Decisions of other courts are in accord. In *Bishop v. People*, 165 Colo. 423, 439 P. 2d 342, the Supreme Court of Colorado considered the appeal of a defendant who had been convicted of the second-degree murder of his three-year-old stepson. The child's death occurred under circumstances strikingly similar to those disclosed by the record in the case now before us. In that case the defendant objected to the portion of the trial court's charge which reads as follows:

"If you should find beyond a reasonable doubt that death ensued from an attack made with the hands or feet, or otherwise, upon an infant of tender years, you are then instructed that under such circumstances malice may be implied."

In approving this instruction and affirming the conviction, the Court said (439 P. 2d, at 346) :

"It is probably true, as a general rule, that where death ensues from an attack made with the hands or feet on a person of mature years, who is in good health, malice cannot be implied. Ordinarily, death would not be caused by such means. However, this general rule does not apply where such an assault with the hands or feet is committed on an infant of tender years or a person enfeebled by old age or disease. In such cases malice may be implied. *Balltrip v. People*, 157 Colo. 108, 401 P. 2d 259; *Milosevich v. People*, 119 Colo. 56, 199 P. 2d 895; *McAndrews v. People*, 71 Colo. 542, 208 P. 486, 24 A.L.R. 655."

The case of *Balltrip v. People*, *supra*, also presented a factual situation strikingly similar to that in the case presently before us. In that case defendant was charged with the murder of a three and one-half-year-old child, who died from head injuries. Defendant lived with the child's mother in a house

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trailer and the child was injured while in defendant's care in the trailer. Defendant contended the child received his injuries by falling from a couch and striking his head on a stove. The State's evidence tended to show that the defendant attacked the child with his fists. In affirming defendant's conviction for second-degree murder the court approved an instruction that if the jury should find beyond a reasonable doubt "that death ensued from an attack made with the hands, or otherwise, upon an infant of tender years, you are then instructed that under such circumstances malice may be implied."

Other illustrative cases in which courts have approved the implication of malice required for second-degree murder from evidence of an attack by hands or feet alone, without use of other weapons, are: *Stockton v. State*, 239 Ark. 228, 388 S.W. 2d 382 (attack upon an eighty-nine-year-old woman); *People v. Kinzell*, 106 Ill. App. 2d 349, 245 N.E. 2d 319 (circumstantial evidence of an attack upon an eight-month-old infant; no evidence of any weapon); *Corbin v. State*, (Ind.) 234 N.E. 2d 261, reh. den. 237 N.E. 2d 376 (father's conviction for second-degree murder in killing of 21-month-old daughter by blows with his hand sustained by divided court; majority found sufficient evidence of malice); *Commonweath v. Buzard*, 365 Pa. 511, 76 A. 2d 394 (attack by large, powerful man upon small, weak man who was prone and defenseless); *Commonwealth v. Dorazio*, 365 Pa. 291, 74 A. 2d 125 (persistent attack upon victim who lay prostrate); See also cases reported in Annotation, "Inference of malice or intent to kill where killing is by blow without weapon," 22 A.L.R. 2d 854.

We have also carefully examined appellant's remaining assignments of error, all of which are directed to various portions of the court's charge to the jury. When the charge is considered as a whole it fairly presented the case to the jury, and we find no prejudicial error therein sufficient to justify awarding a new trial. In the entire trial and in the judgment imposed we find

No error.

Judges CAMPBELL and MORRIS concur.

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IN THE MATTER OF: GENEVA H. THOMAS AND DY-DEE SUPPLY CO., INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 7221SC11

(Filed 23 February 1972)

**Master and Servant § 108—unemployment compensation — availability for work — advanced age**

A 70-year-old former laundry employee is not unavailable for work merely because employers in her locality do not customarily employ persons who have reached her age. G.S. 96-13(3).

Chief Judge MALLARD and Judge GRAHAM concurring in part and dissenting in part.

APPEAL by claimant from *Kivett, Judge*, 7 June 1971 Session of Superior Court held in FORSYTH County.

This is a proceeding under the North Carolina Employment Security Law wherein Geneva H. Thomas (claimant) seeks weekly unemployment benefits from 4 November 1970 through 19 January 1971. The Employment Security Commission (Commission) made findings and conclusions which, except where quoted, are summarized as follows: The claimant is a seventy-year-old woman with a fifth-grade education. She worked in a laundry, Dy-Dee Supply Co., Winston-Salem, N. C., as a "laundry hand" for twenty years prior to her voluntary "retirement" on 10 June 1970. Prior to working in a laundry, claimant worked in a tobacco factory. She has no other work experience. The claimant has received Old Age and Survivor Insurance benefits (Social Security) since 1962. She is presently receiving Social Security benefits at the rate of \$89.00 per month. The claimant received no retirement pay or pension from her last employer.

"3. Under the present benefit series, the claimant filed a claim on August 12, 1970, and to the date of the hearing before the Appeals Deputy on January 22, 1971, she had filed twenty-three consecutive weekly claims for benefits through the week ending January 19, 1971. She has had no employment since she voluntarily separated from Dy-Dee Supply Company, Inc., on June 10, 1970, to enter into retirement. The claimant's right to benefits from August 12, 1970, through November 3, 1970, has been determined under Docket Nos. 4708-12, 4921-12, and 41830-AT-70. Said determinations were that the claimant was not avail-

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able for work and therefore not eligible for benefits. The determinations of the deputies were not appealed and thus have become final."

"The record indicates that the claimant was in good health and thus, presumably, was able to work. The record also shows that the claimant sought work each week (while filing claims) with several laundries, churches, motels, and other businesses. However, these efforts were almost useless because these potential employers would not hire anyone of her age. . . . Thus, her chances of securing employment in the area in which she is experienced (laundry) are almost nil because of her advanced years. In the domestic and related fields, the claimant has almost no hope of securing employment due to her lack of experience, limited education, and advanced years.

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. . . [I]t has not been established that she is available for work within the meaning of the law, because it does not appear that she had a reasonable chance of obtaining employment within her locality because of her advanced age, lack of skills, and limited education.

Considering the fact that the claimant voluntarily relinquished her employment to retire when she could have continued working, it is concluded that the claimant is not realistically an active member of the labor force. She is therefore not available for work and is ineligible for benefits."

Based on its findings and conclusions, the Commission entered an order decreeing:

"(1) The claimant is ineligible for benefits from November 4, 1970, through January 19, 1971; and

(2) The first continued claim filed by the claimant following the date this decision becomes final shall be referred to a Claims Deputy on the question of her chances of getting work."

From a judgment of the superior court dated 10 June 1971 affirming the decision of the Commission, the claimant appealed to the Court of Appeals.

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*Vernon Hart for claimant appellant.*

*D. G. Ball, H. D. Harrison, Jr., Howard G. Doyle and Garland D. Crenshaw for the Employment Security Commission of North Carolina, appellee.*

HEDRICK, Judge.

Claimant concedes that the Commission's findings, material to our decision, are supported by competent evidence in the record. With the exception of the conclusion that claimant is not available for work within the meaning of the law, the findings and conclusions of the Commission will support an order that claimant is eligible for benefits from 4 November 1970 through 19 January 1971. Thus, the one question presented on this appeal is whether the conclusion made by the Commission that claimant is not available for work within the meaning of the law is supported by the findings of fact.

The law referred to is G.S. 96-13 which, in pertinent part, provides:

"An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that—

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(3) He is able to work, and is available for work: Provided that no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work. . . . "

In *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968), Justice Lake, speaking for the North Carolina Supreme Court, said, "The terms 'able to work', 'available for work' and 'suitable employment' are not precise terms capable of application with mathematical precision." Neither the Legislature nor the North Carolina Supreme Court has formulated an all-embracing rule or test for determining what constitutes being "available for work."

In concluding that the claimant was not available for work within the meaning of the law, the Commission formulated and used its own test of availability for "voluntary retirees." Although the claimant might be classified a "voluntary retiree," such a test as formulated by the Commission has no application

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in the present case because there is nothing in the Employment Security Law relating to "voluntary retirees." In its Decision, the Commission reasoned:

" . . . [I]t has not been established that she is available for work within the meaning of the law, because it does not appear that she had a reasonable chance of obtaining employment within her locality because of her advanced age, lack of skills, and limited education.

Considering the fact that the claimant voluntarily relinquished her employment to retire when she could have continued working, it is concluded that the claimant is not realistically an active member of the labor force."

In 55 Yale L.J. 123, we find the following:

"The availability requirement is said to be satisfied when an individual is willing, able, and ready to accept suitable work which he does not have good cause to refuse, that is, when he is genuinely attached to the labor market. Since under unemployment compensation laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual exists when there is a market for the type of services which he offers in the geographical area in which he offers them. 'Market' in this sense does not mean that job vacancies must exist; the purpose of unemployment compensation is to compensate for the lack of appropriate job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which he is offering them."

We think the Commission's findings of fact will support a conclusion that a "labor market" exists in the Winston-Salem area for the type of service which the claimant has to offer, and that the claimant is "genuinely attached to the labor market." There is no finding that the type of service which the claimant is offering is not being generally performed in the Winston-Salem area. On the contrary, we think it could be fairly concluded from the findings of fact that laundry and domestic work is being performed in the Winston-Salem area at all times.

In *Krauss v. A & M Karagheusian, Inc.*, 13 N.J. 447, 100 A. 2d 277 (1953), we find the following statement: "The prac-

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tice of some employers not to hire applicants above certain ages irrespective of their capacity and willingness to do the work the employer has to offer is a voluntary standard and is not embraced in any legal prohibition." Therefore, the fact that employers in Winston-Salem do not customarily employ persons seventy years of age is of no legal significance in determining whether a labor market exists for the type of services a claimant has to offer.

Although the circumstances of the claimant's work separation are to be considered in determining whether he is available for work and genuinely attached to the labor market, *Krauss v. A & M Karagheusian, Inc.*, *supra*, we do not think that the fact that she voluntarily retired is alone sufficient to support a conclusion that the claimant is "not realistically an active member of the labor force." The record in the present case clearly shows that the claimant was disqualified from receiving benefits for more than the maximum period (twelve weeks), because she voluntarily left her employment with Dy-Dee Supply Co. without good cause attributable to the employer. G.S. 96-14(1). The fact that the claimant sought work each week at several laundries, churches, motels, and other businesses while filing claims will support a conclusion that the claimant was actively seeking work and was "genuinely attached to the labor market."

We think what was said in *Claim of Bourne*, 282 App. Div. 1, 122 N.Y.S. 2d 25 (App. Div. 1953), is appropriate:

"It is a matter of growing importance to the community to continue to utilize the skills and experience of its older people; and as the life span expands the problem becomes progressively more pressing. The Unemployment Insurance Law is intended to protect and continue the working activity of all members of the community.

It is not merely for the protection of young workers but also of workers of advanced years who remain in the labor market. We take unusual care in this decision not to suggest or to imply that age alone necessarily results in non-availability in the labor market. Availability is the statutory test; but it must be applied individually to the facts of each case as the administrator sees them.

Age, linked to a lack of physical or mental capacity to work, or age coupled with restrictions which cut down greatly the

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possibility of employment, may fairly result in a finding of non-availability. But an able aged man is an available man if he has remaining abilities that can be sold on the market."

We think the Commission's conclusion that the claimant is not available for work is erroneous and not supported by the facts found, for it is clear from the decision of the Commission that its conclusion was based on the fact that the claimant is a seventy-year-old woman with a fifth-grade education and limited skills. We think the facts found by the Commission compel the conclusion that a labor market exists in the Winston-Salem area for the type of service the claimant has to offer and that she is genuinely attached to the labor market, and that she is available for work within the meaning of G.S. 96-13.

For the reasons stated, the judgment of the superior court affirming the decision of the Employment Security Commission is reversed and the case is remanded to the superior court for the entry of an order remanding the proceeding to the Employment Security Commission with directions that the Commission make a conclusion with respect to whether the claimant was available for work from 4 November 1970 through 19 January 1971, based on the facts already found and not inconsistent with the principles expressed in this opinion.

Reversed and remanded.

Chief Judge MALLARD and Judge GRAHAM concur in part and dissent in part.

Chief Judge MALLARD concurring in part and dissenting in part.

Claimant lives in the Winston-Salem area. In my opinion, the fact that employers in that area who employ domestic and laundry workers (the only skills possessed by claimant) customarily do not employ persons over seventy years of age, does have legal significance in determining whether a "labor market" exists there and whether claimant is able and available for work.

The Commission, however, in its "conclusions of law," stated the degree of proof it used in finding the facts, as fol-

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lows: "It must be shown by clear, cogent, and convincing evidence that she is available for work under the law. This has not been done in this case." This was error. The degree of proof required is by the greater weight of the evidence. See G.S. 143-318(1).

Had the Commission found the facts by the greater weight of the evidence, it is my opinion that its legal conclusions are correct and that the claimant "is not realistically an active member of the labor force," and "(s)he is therefore not available for work and is ineligible for benefits." It is my opinion that the Commission, in substance, properly concluded that under the standards established by employers in the Winston-Salem area, this claimant, a laundry worker who voluntarily retired after age 70 and the next week applied for benefits, does not possess abilities that can be sold on the available market and therefore was not able or available for work. Under the facts actually found in this case, no "labor market" exists in the Winston-Salem area for the type of service which this claimant has to offer.

I agree that the case should be remanded, but only for the purpose of determining the facts by the greater weight of the evidence and then proceeding lawfully.

Judge GRAHAM concurring in part and dissenting in part.

The Commission denied claimant benefits "because it does not appear that she had a reasonable chance of obtaining employment within her locality because of her advanced age, lack of skills, and limited education." Insofar as this record shows, claimant is no less skilled and no less educated now than she was during the twenty years she was employed as a laundry worker. Moreover, the work in which claimant is experienced requires minimal skills and education. Consequently, it appears that she may have been denied benefits because at age 70 it is less likely that potential employers will hire her than would be the case if she were a younger person. I agree with Judge Hedrick that this is error and that the case must be remanded.

There is no statutory basis for denying compensation to a claimant who is willing, able and available to accept suitable work solely because his age has lessened his employment prospects. Whether "advanced age" should alone be grounds for determining that a claimant is unavailable for work is a matter

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for the General Assembly and not for the Commission or the courts.

I dissent, however, from that portion of Judge Hedrick's opinion which directs the Commission to enter an order awarding benefits. The fact that benefits were denied on grounds which cannot be sustained does not mean that claimant has satisfied the Commission, as she is required to do (G.S. 96-13), that she is able to work and is available for work. When she quit her job to retire, claimant removed herself from the labor market. Whether she thereafter re-entered the labor market and became "available for work" is a question which still must be determined by the Commission.

It is noted that one finding made by the Commission suggests that claimant may have failed to show that she is available for work in that she lives with and cares for a 54-year-old retarded daughter and is not certain arrangements can be made for the care of her daughter should claimant find employment. The Employment Security Act was not designed to provide payments to a worker whose family responsibilities are such as to preclude the acceptance of any and all employment. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1.

Furthermore, the record contains evidence which would support a determination that claimant has not seriously re-attached herself to the labor market. She quit her job on 10 June 1970 in order to retire. One week later she filed for unemployment benefits at the Commission office which is only six blocks from her home. No explanation is made as to why she changed her mind about retirement within such a short period of time. When asked if she had decided to return to work, claimant stated: "Well, I said day work. You know, I thought maybe I would get a couple of days work at age 70—I do my best and I have a retarded daughter at the house. And it takes some of my time there with her. . . ." Claimant was asked why she wanted to start work again. She stated: "What you all—this employment required—when I retired at 70, I said, well, I want to retire while I was in my good health and then in case they called me back, I would go back but you know, I didn't want to stay in there and fall out. I think 70 years was a good service. I think that [sic] right. Ain't I right?" Although on several occasions claimant stated that she would accept full-time employment even if it resulted in a loss of Social Security benefits, on other

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occasions she indicated that she would not want to earn more than \$1,680.00 in a single year and thereby be forced to give up a portion of these benefits. A full-time job paying \$1.45 an hour, which is the amount claimant earned when she retired, would result in earnings in excess of this amount.

As stated by the Michigan Supreme Court in *Dwyer v. Unemployment Comp. Comm.*, 321 Mich. 178, 189, 32 N.W. 2d 434, 438, "[w]hether or not a claimant is in fact available for work depends to a great extent upon his mental attitude. . . ." I vote to remand this case to the superior court with directions that it be remanded to the Employment Security Commission for a re-determination as to whether claimant is "available for work."

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GEORGE W. DAVIS, ADMINISTRATOR OF THE ESTATE OF ALICE BURTON  
DAVIS v. WILLIAM L. IMES

No. 7219SC116

(Filed 23 February 1972)

**1. Automobiles § 8— duty to maintain proper lookout**

It is the duty of one proceeding along a public highway to maintain a proper lookout and to exercise due care to avoid colliding with vehicles entering the highway from private premises.

**2. Automobile §§ 17, 30— violation of safety statutes — negligence**

The violation of statutes relating to speed restrictions, driving on the right side of the road and meeting other vehicles constitutes negligence. G.S. 20-141; G.S. 20-146; G.S. 20-148.

**3. Automobiles § 18— entering highway from private driveway — right-of-way**

A motorist entering a public highway from a private driveway has the duty to yield the right-of-way to all vehicles approaching on the public highway. G.S. 20-156(a).

**4. Automobiles § 74— entering highway from private driveway — contributory negligence**

Plaintiff's evidence did not disclose that his intestate was contributorily negligent as a matter of law in entering the highway from a private driveway, where it tended to show that plaintiff's intestate had completed her entry into the highway and had proceeded 25 to 30 feet in her right-hand lane of the highway when she was struck by defendant's oncoming vehicle which was across the center line and traveling at 80 mph.

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**Davis v. Imes**

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**5. Automobiles § 46— opinion testimony as to speed — opportunity for observation**

The trial court did not err in allowing a witness to give his opinion that the speed of defendant's vehicle was "about seventy" prior to the collision, notwithstanding the witness testified he did not have a chance to observe "the automobiles for any length of time," where he testified that he observed defendant's automobile as it went by the end of a driveway and watched it collide with the other vehicle, and there was other evidence that the distance from the driveway to the point of collision was 200 feet or more.

**6. Automobiles § 90— instructions — entering highway from private driveway — duties of motorists**

The trial court's instructions on the respective duties of a motorist entering a public highway from a private driveway and of a motorist traveling on the public highway were confusing and erroneous. G.S. 20-156(a).

**7. Death § 7— wrongful death — damages — instructions — "mortuary value"**

Instruction that the jury in a wrongful death action could consider "the mortuary value of deceased" in determining damages, without further explanation as to the meaning of those words, was erroneous.

**8. Death § 7— wrongful death — damages — instructions — car owned by decedent's husband**

Instructions that the "car" could be considered on the issue of damages in a wrongful death action was erroneous where the automobile driven by plaintiff's intestate was alleged to have been owned by her husband.

APPEAL by defendant from *Olive, Judge*, July 1971 Civil Session of Superior Court held in ROWAN County.

Civil action instituted to recover damages for the wrongful death of the plaintiff's intestate resulting from an automobile accident on 20 May 1969. The plaintiff's intestate, Mrs. Davis, received fatal injuries when she attempted to enter a rural paved road from a private driveway and her automobile collided with an automobile driven by the defendant. This action, wherein it was alleged defendant was negligent, was instituted on 3 August 1970. Defendant, in his "Answer and Counterclaim" filed 23 October 1970, denied negligence on his part and alleged the negligence of the plaintiff's intestate as a bar to any recovery. The case was tried by jury on 12 and 13 July 1971 and resulted in the following verdict and judgment for the plaintiff:

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"This cause coming on to be heard and being heard before His Honor, Hubert E. Olive, and a jury, at the July 12, 1971 Session of the Superior Court for Rowan County, North Carolina, and the jury having answered the issues submitted to it as follows:

1. Was the death of the plaintiff's intestate, Alice Burton Davis, caused by the negligence of the defendant as alleged in the complaint?

ANSWER: Yes

2. If so, did the plaintiff's intestate by her own negligence contribute to the cause of her death as alleged in the answer?

ANSWER: No

3. What amount, if any, is the plaintiff entitled to recover?

ANSWER: \$20,000.00

4. Was the defendant injured by the negligence of plaintiff's intestate as alleged in the defendant's counter-claim?

ANSWER: \_\_\_\_\_

5. What amount, if any, is the defendant entitled to recover?

ANSWER: \_\_\_\_\_

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover from the defendant the sum of Twenty Thousand (\$20,000.00) Dollars, together with the costs of this action to be taxed against the defendant.

This the 13th day of July, 1971.

/s/ Hubert E. Olive  
JUDGE PRESIDING"

Defendant's motions for directed verdict, judgment notwithstanding the verdict and for a new trial were denied, and from the entry of the judgment, defendant appealed to the Court of Appeals.

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*Woodson, Hudson, Busby & Sayers by Donald D. Sayers for plaintiff appellee.*

*Kluttz & Hamlin by Lewis P. Hamlin, Jr., for defendant appellant.*

MALLARD, Chief Judge.

The defendant's first contention is that the trial court erred in failing to direct a verdict or enter judgment notwithstanding the verdict for defendant, on the ground that plaintiff's intestate was guilty of contributory negligence as a matter of law. This contention is without merit.

"Since the burden of proof on the issue of contributory negligence is upon the defendants, a motion for judgment of involuntary nonsuit upon that ground should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with all inferences favorable to him which may reasonably be drawn therefrom, so clearly establishes the defense that no other conclusion can reasonably be drawn. *Cowan v. Transfer Co.*, 262 N.C. 550, 138 S.E. 2d 228; *Waters v. Harris*, 250 N.C. 701, 110 S.E. 2d 283; *Johnson v. Thompson*, 250 N.C. 665, 110 S.E. 2d 306; *Morrisette v. Boone Co.*, 235 N.C. 162, 69 S.E. 2d 239; Strong's N. C. Index, Negligence, § 26, and cases there cited." *Raper v. Byrum*, 265 N.C. 269, 144 S.E. 2d 38 (1965).

In the case before us, the evidence for the plaintiff tended to show the following: Mrs. Davis, a woman of 72 years of age, died as a result of injuries received in an accident which occurred at the intersection of a private driveway and Needmore Road, a sixteen-foot-wide rural paved road (No. 1984) in Rowan County. Plaintiff's witness Hubert Kyles testified that he saw Mrs. Davis approach the end of the driveway and stop, look in both directions, pull out into Needmore Road and proceed in an easterly direction. He also testified that he heard the defendant Imes' automobile approaching in the distance, its engine making a "very highpitched" noise, and observed it traveling west on Needmore Road for a distance of approximately 200 feet until it collided "almost head-on" with Mrs. Davis' automobile, which had by then completed its entry into her right-hand lane of Needmore Road and had proceeded east 25 or 30

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feet to the point of the collision. It was Kyles' opinion that the speed of the defendant's automobile at the time he observed it was 80 miles per hour. Another witness, Donald Kyles, testified that he too had observed the accident, had seen and heard the defendant's automobile prior to the collision, and had formed the opinion that its speed was "about seventy." The plaintiff's evidence indicated that Mrs. Davis was in her own lane of travel; that is, the south lane proceeding east, and that the Imes vehicle had crossed the center point of the road; that is, had crossed from the north lane into the south lane proceeding west, when the collision occurred, and that there were no skid marks at or near the point of collision.

In his complaint, the plaintiff alleged that the defendant was negligent in that:

"(a) He operated an automobile upon a highway carelessly and heedlessly in willful and wanton disregard of the rights and safety of others and without due caution and circumspection and at a speed and in a manner so as to endanger or be likely to endanger persons and property, in violation of G.S. § 20-140.

(b) He operated an automobile upon a public highway at a speed greater than was reasonable and prudent under the conditions then existing in violation of G.S. § 20-141 (a).

(c) He operated an automobile upon a public highway at a rate of speed in excess of 55 miles per hour, in violation of G.S. § 20-141 (b).

(d) He failed to reduce speed when approaching and going around a curve.

(e) He failed to reduce speed when approaching a hill-crest.

(f) In that upon a highway of sufficient width, he failed to drive the automobile upon the right half of the highway and as closely as possible to the right-hand edge or curb thereof, in violation of G.S. § 20-146.

(g) In that when approaching an automobile proceeding in the opposite direction he failed to pass to the right of the plaintiff's intestate's automobile and failed to give to the plaintiff's intestate at least one-half of the main-

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traveled portion of the roadway, in violation of G.S. § 20-148.

(h) He drove on the public highways without keeping a proper lookout, without paying proper attention to his driving and without keeping the vehicle which he was driving under proper control."

In his answer, the defendant alleged that the plaintiff's intestate was contributorily negligent in that:

"(a) In emerging from a private driveway, she failed to yield the right of way to traffic on the main traveled highway, including this defendant.

(b) She failed to keep a proper lookout and failed to keep her vehicle under proper control.

(c) She drove her vehicle into the highway carelessly and heedlessly in willful and wanton disregard of the rights and safety of others.

(d) She drove her vehicle on the highway without due caution and circumspection and at a speed and in a manner so as to endanger or be likely to endanger, persons and property."

Defendant also alleged the same acts of negligence on the part of the plaintiff's intestate as the basis for his counterclaim. In reply to this counterclaim, the plaintiff denied negligence and alleged contributory negligence of the defendant as a defense.

[1] It is the duty of one proceeding along a public highway to maintain a proper lookout and to exercise due care to avoid colliding with vehicles entering the highway from private premises. 60A C.J.S., Motor Vehicles, § 347. *Garner v. Pittman*, 237 N.C. 328, 75 S.E. 2d 111 (1953).

[2] The violation of G.S. 20-141, G.S. 20-146 or G.S. 20-148, relating to speed restrictions, driving on the right side of the road and meeting other vehicles, constitutes negligence (although such negligence is not actionable unless it is the proximate cause of the injuries complained of). See *Lassiter v. Williams*, 272 N.C. 473, 158 S.E. 2d 593 (1968); *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529 (1968); *Smart v. Fox*, 268 N.C. 284, 150

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S.E. 2d 403 (1966); *Anderson v. Webb*, 267 N.C. 745, 148 S.E. 2d 846 (1966); *Raper v. Byrum*, *supra*.

[3] On the other hand, G.S. 20-156(a) requires that "the driver of a vehicle entering a public highway from a private road or drive shall yield the right-of-way to all vehicles approaching on such public highway." Furthermore, "(i)n order to comply with this statute, a driver entering a public highway from a private drive is required to look for vehicles approaching on such highway, to look at a time when the precaution may be effective, to yield the right-of-way to vehicles traveling on the highway, and to defer entry until the movement may be made in safety. *Gantt v. Hobson*, 240 N.C. 426, 82 S.E. 2d 384; *Garner v. Pittman*, 237 N.C. 328, 75 S.E. 2d 111." *Equipment Co. v. Hertz Corp. and Contractors, Inc. v. Hertz Corp.*, 256 N.C. 277, 123 S.E. 2d 802 (1962). See also, *Smith v. Nunn*, 257 N.C. 108, 125 S.E. 2d 351 (1962); 60A C.J.S., Motor Vehicles, § 345.

[4] The defendant appellant contends, however, that we should find from a review of the evidence in the present case that the plaintiff's intestate was contributorily negligent as a matter of law, apparently because she had an "unqualified duty to yield to traffic on the public highway." We do not agree. The evidence, viewed in the light most favorable to the plaintiff, tends to show that Mrs. Davis exercised due care before entering the paved road and had attained her own lane of proposed travel before being struck by the defendant. The plaintiff's evidence also showed that, looking eastward from the private drive, in the direction from which the defendant was approaching, Mrs. Davis had an unobstructed view of the road for about 100 feet and a partially obstructed view for another 25 to 50 feet beyond. If, as an eyewitness to the accident testified, the defendant was driving his vehicle at 80 miles per hour just prior to the collision, he would have covered the portion of the road visible to Mrs. Davis east from the private driveway in just slightly over one second.

In his brief the appellant relies upon the cases of *Blackwell v. Butts*, 10 N.C. App. 347, 178 S.E. 2d 644 (1971), and *Garner v. Pittman*, *supra*. *Blackwell* was reversed by the Supreme Court in 278 N.C. 615, 180 S.E. 2d 835 (1971).

In *Blackwell*, the Supreme Court also distinguished *Garner v. Pittman*, *supra*, (relied upon by the defendant in the present

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case) and the case of *Warren v. Lewis*, 273 N.C. 457, 160 S.E. 2d 305 (1968), and we believe that the distinctions drawn are appropriate to the present case as well. In *Garner*, it appeared that the vehicle containing the plaintiff was entering a street from forty to sixty feet wide, that the driver had an unobstructed view of the dominant highway for 200 to 300 feet, that the speed of the defendant's automobile was only fifty miles per hour, reduced to 30 or 35 miles per hour before the collision, and that it struck the emerging automobile in the side, before it had attained its proper lane of travel. In *Warren*, it appeared that the plaintiff had an unobstructed view in the direction from which the defendant's automobile was approaching for 400 to 600 feet, plus an additional 50 feet beyond the crest of a hill, had moved into the intersection for a distance of only sixteen feet and never saw the defendant's vehicle until the moment of collision. In both of these cases, the driver emerging from the private road or driveway into the public highway was held to have been contributorily negligent as a matter of law for failing to yield the right-of-way to oncoming traffic.

We do not think that these and other cases wherein the user of the private driveway or servient highway had the opportunity to observe approaching vehicles and failed to do so, and where the evidence did not tend to show that the respective defendants were so grossly in violation of the traffic laws, are applicable to the facts in the case before us, nor do we think that it was error for Judge Olive to allow the case to go to the jury and to deny defendant's motion for judgment notwithstanding the verdict.

[5] Defendant also contends that the court committed error in permitting the witness Donald Kyles (Donald) to give his opinion that the speed of the defendant's vehicle was "about seventy" just prior to the collision. Although Donald testified that he did not have a chance to witness "the automobiles for any length of time," he did testify that he saw the Imes automobile as it went by the end of the driveway and turned and watched it collide with the Davis automobile. There was other evidence that from the end of the driveway to the point where the cars collided was two hundred feet or more. The court did not commit error in permitting Donald to give his opinion as to the speed of the defendant's vehicle. See *Loomis v. Torrence*, 259 N.C. 381, 130 S.E. 2d 540 (1963).

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[6] Defendant assigns as error the following portions of the instructions given by the judge to the jury:

“Now, the law in this State, Statute Law, as enacted by the Legislature is, that a person entering a highway, a road, from a private driveway shall yield the right of way to traffic on the highway, and not proceed into the road until that person can see from what they can see would be in safety. On the other hand, the operator of an automobile on this highway, road, can presume up until he can see different that a person from a driveway will not come out of the driveway into the path of the oncoming automobile; but said operator must keep a lookout and see what he can see and when he is in a position to see, then he must proceed lawfully or stop . . . .”

In the foregoing portion of the charge, the judge undertook to declare and explain the law with respect to the duties of the plaintiff and the defendant under G.S. 20-156(a). We think that the jury must have been confused about how to consider the evidence and the meaning of the words “and not proceed into the road until that person can see from what they can see would be in safety,” and “can presume up until he can see different” and “but said operator must keep a lookout and see what he can see and when he is in a position to see, then he must proceed lawfully or stop.” Sometimes mistakes are made in the transcribing of the charge, but we are bound by the record. We hold that this portion of the charge was error in view of the principles set forth in *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971); *Day v. Davis*, 268 N.C. 643, 151 S.E. 2d 556 (1966); *Equipment Co. v. Hertz Corp. and Contractors, Inc. v. Hertz Corp.*, *supra*; *King v. Powell*, 252 N.C. 506, 114 S.E. 2d 265 (1960); *Gantt v. Hobson*, *supra*; *Blalock v. Hart*, 239 N.C. 475, 80 S.E. 2d 373 (1954) and *Garner v. Pittman*, *supra*. See also, 60A C.J.S., Motor Vehicles, § 345.

The defendant also assigns as error the charge given as to the measure of damages on the third issue, which reads as follows:

“Now, the measure of damages on this issue if you come to it, ladies and gentlemen of the jury, is that where one is injured resulting in the death of the one injured by the actionable negligence of another, the personal representa-

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tive of the deceased is entitled to recover as damages one compensation in a lump sum as would be a reasonable compensation for all loss approximately (sic) resulting from the defendant's wrongful and negligent act. These are understood to embrace indemnity for actual expenses incurred, *car* (sic), treatment, hospitalization, compensation for pain and suffering, and funeral expenses, incident to the injury and resulting death, as well as the *mortuary value of the deceased* to husband and children. (*Reads Statute*). It is for you, the jury, to say from all the circumstances what you find from the evidence and by its greater weight is a fair and reasonable sum which the defendant should pay the plaintiff by way of compensation for the alleged injury and death sustained. (Emphasis added.)

\* \* \*

Now, ladies and gentlemen of the jury, the Court instructs you as a matter of law that if you come to this third issue if you are satisfied from the evidence and by its greater weight that the Plaintiff's decedent Mrs. Davis was injured, which injury resulted in her death, you would answer this issue in whatever amount you are satisfied from the evidence and by its greater weight according to the definition the Court has given you as to income and so forth. \* \* \* "

[7, 8] This charge is deficient in several respects, among which are: we are not told what statute the judge read. (This was apparently an omission of the court reporter.) No explanation appears as to what was meant by "mortuary value of the deceased" and the jury was therefore left to guess. The automobile driven by plaintiff's intestate was alleged to have been owned by her husband, and though there was no evidence as to its value, the jurors were instructed that the "car" could be considered in some manner in determining the answer to the third issue. (The experienced trial judge who tried this case may have used the word "care," but the appellee stipulated that what was filed in this court was the record. On this record the word is "car.")

Defendant has other assignments of error, some of which may have merit, but since they are not likely to recur on a new trial, we do not deem it necessary to discuss them.

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For the reasons given, the verdict and judgment are vacated and a new trial is ordered.

New trial.

Judges MORRIS and PARKER concur.

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JAMES B. ZUCCARELLO v. EARLINE OWEN ZUCCARELLO

No. 7219DC168

(Filed 23 February 1972)

Divorce and Alimony § 23— child support — separation agreement — order by court

Where the parties entered into a separation agreement requiring plaintiff to pay defendant \$400 per month on a \$36,000 note and \$600 per month for child support, and there was evidence that the total payment of \$1,000 per month was intended by the parties to be for child support, the trial court's order that plaintiff pay \$1,000 per month for child support did not alter the separation agreement but merely required plaintiff to pay the amount that he had agreed to pay.

APPEAL by plaintiff from *Walker, Judge*, 27 September 1971 Session of District Court, CABARRUS County.

The parties hereto were married in 1958. Two children were born of the marriage, one in 1960 and the other in 1963. The parties separated in March 1969 and entered into a separation agreement in December 1969. On 14 September 1970, husband in an uncontested divorce action, obtained an absolute divorce from defendant. The judgment entered in that action did not refer to the separation agreement nor did it in any way provide for the custody or support of the minor children of the parties.

On 17 May 1971, defendant filed a motion in the cause asking for custody of the children, support for them, and attorneys' fees. The separation agreement was attached to the motion as "Exhibit A." Plaintiff answered denying that he was in arrears in any payments due under the separation agreement and asking that the \$400 monthly payments provided for in the separation agreement be judicially determined to constitute alimony.

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A hearing was had at which both plaintiff and defendant testified before the court without a jury. In the record it is stipulated that no stenographic record of the evidence was made.

The court made findings of fact and ordered plaintiff to pay defendant for child support \$1,000 per month until further orders of the court. He also ordered plaintiff to pay a certain amount for attorneys' fees and fixed the custody of children in defendant with stated visitation rights in plaintiff. Plaintiff appeals from the entry of the order.

*Webster S. Medlin for plaintiff appellant.*

*Hartsell, Hartsell and Mills, by W. Erwin Spainhour, for defendant appellee.*

MORRIS, Judge.

The separation agreement between the parties provided that plaintiff had "simultaneously with the execution of this agreement, delivered to Earline Owen Zuccarello a note for the sum of Thirty-six Thousand Dollars (\$36,000.00) due and payable at the rate of Four Hundred Dollars (\$400.00) per month without interest, which note shall be secured by a second mortgage deed of trust to William L. Mills, Jr., Trustee, covering a one-half (1/2) undivided interest in Lots Nos. 1 and 2 of the Harry A. Martin and Lee A. Martin Subdivision . . . and the assignment of an insurance policy upon the life of James B. Zuccarello for the sum of not less than Twenty-five Thousand Dollars (\$25,000.00)." An additional provision was "That James B. Zuccarello shall pay to Earline Owen Zuccarello on or before the 15th day of each month, beginning with January, 1970, the sum of Six Hundred Dollars (\$600.00) [Three Hundred Dollars (\$300.00) for each child] for the support of Jan Owen Zuccarello and James Bennett Zuccarello III, and on the 15th day of the month following each child's thirteenth (13th) birthday, James B. Zuccarello shall increase the payment for the respective child to Three Hundred Seventy-Five Dollars (\$375.00) per month and shall thereafter continue to make such payments in such amount until the child shall have completed her or his education or otherwise become emancipated; and that James B. Zuccarello shall carry hospitalization insurance and shall be responsible for all extraordinary or unusual expenses which may arise in regard to the health and education of his minor chil-

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dren, Jan Owen Zuccarello and James Bennett Zuccarello III." Title to the house in which the parties lived and title to an automobile were transferred to defendant, and she agreed to assume the monthly payments on the indebtedness due on each. The agreement provided that defendant should have the custody and control of the children provided that they might visit with plaintiff at such times as might be mutually agreed between the parties.

At the hearing defendant testified that the children, then 11 and 8 years of age, had been with her since the separation; that she never worked at public work during her marriage with the exception of helping the plaintiff at his dental office for a short period of time; and that "The plaintiff and I contemplated that the monthly expenses for supporting our children on a standard to which they had been accustomed would amount to approximately One Thousand Dollars (\$1,000.00) per month. We contemplated that it would take the money provided for the children in the separation agreement, as well as the money which the plaintiff agreed to pay me on the note in the separation agreement, to provide for our children. . . ." Defendant introduced expenses for the months of June, July and August, 1971. Expenses for June were \$1,011.89; for July, \$599.07; and for August, \$1,081.86. She explained that she and the children had spent the month of July with her parents in Tennessee which accounted for the difference in that month and the other months. The plaintiff's gross income in 1970 was between \$70,000 and \$75,000. He showed for the year 1969 in a joint return a taxable income of only \$17,960 and claimed over \$5,000 in depreciation. We note that in December of 1969 he executed the agreement under which he agreed to pay defendant \$1,000 per month. Plaintiff is the sole shareholder in P.M.S. Laboratory, Inc., to which he paid \$11,000 lab fees in 1969. We note also that the tax return shows a deduction for rent in the amount of \$3,245 and that plaintiff's office was maintained in a building in which he owned one-half interest, and further, that the net taxable income from that building to the owners was \$1,134.01 after a depreciation deduction of \$1,959.82. Defendant testified that since her separation from plaintiff she had worked on a part-time basis as a kindergarten teacher from which she received an income of between \$150 and \$160 per month and further "I have no other income."

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Plaintiff testified that for the year 1968 his net income was \$20,000; for 1969, \$17,000; for 1970, \$26,000; that he owned one-half undivided interest in the clinic building in which he maintained his office which was encumbered by two deeds of trust, one of which was "to secure the separation agreement" and that payments on the note secured by the other deed of trust were in arrears; that he owned a lot at Beech Mountain but that payments on that were not in arrears; that he had to purchase the lot to maintain his membership in the ski lodge; that he was delinquent in his income tax payments since 1 January 1970 in the total amount of some \$15,000; that his monthly obligations totaled \$2,620.10; that he had been advised that he was insolvent; that he lived in an apartment in Charlotte for which he paid \$150 per month and commuted daily to Concord to his office.

The court made findings of fact, and upon those findings certain conclusions of law, upon which its judgment was based. Those findings and conclusions pertinent to this appeal, renumbered, are as follows:

FINDINGS OF FACT:

1. "That there has never been an Order entered in this cause by the court related to the custody and support of the infant children born of the marriage."
2. "That prior to the institution of this action for divorce, the plaintiff entered into a separation agreement with the defendant whereby the plaintiff, James B. Zuccarello, agreed, among other things:
  - (a) To pay the defendant, Earline Owen Zuccarello, the sum of Six Hundred Dollars (\$600.00) per month for the support and maintenance of Jan Owen Zuccarello and James Bennett Zuccarello III; and
  - (b) To execute and deliver to the defendant, Earline Owen Zuccarello, a note for the sum of Thirty-six Thousand Dollars (\$36,000.00) due and payable at the rate of Four Hundred Dollars (\$400.00) per month."
3. "That it was contemplated by the parties at the time of the execution of the separation agreement that the monthly

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expenses for supporting the infant children on a standard to which they had been accustomed would take approximately One Thousand Dollars (\$1,000.00) per month."

4. "That the plaintiff, James B. Zuccarello, paid the defendant, Earline Owen Zuccarello, the total sum of One Thousand Dollars (\$1,000) per month for the period from December, 1969, through May, 1971, including the payments on the Thirty-six Thousand Dollar (\$36,000.00) note; the sum of Six Hundred Dollars (\$600.00) from January 1 through August 31; and the sum of Two Hundred Dollars (\$200.00) for the month of September."

5. "That the monthly expenses of the defendant, Earline Owen Zuccarello, for the month of June, 1971, in connection with the support and maintenance of the infant children, including house payments, maintenance on the dwelling occupied by the children, telephone, lights, water, country club expenses, food, medical expenses, drugs, clothing, camping activities, automobile expenses, school materials, sundries and other essential miscellaneous items cost One Thousand Eleven Dollars Eighty-nine Cents (\$1,011.89); that said expenses for the month of July, 1971, amounted to Five Hundred Ninety-nine Dollars Seven Cents (\$599.07) and that said expenses for the month of August, 1971, amounted to One Thousand Eighty-one Dollars Eighty-six Cents (\$1,081.86)."

6. "That the defendant, Earline Owen Zuccarello, and her infant children spent most of July, 1971, with the defendant's parents in Pulaski, Tennessee, which accounts for the reduction in the expenses for the month of July, 1971."

7. "That the plaintiff, James B. Zuccarello, has failed to comply with the terms and provisions of the separation agreement, that the payments for child support are now in arrears in the sum of Four Hundred Dollars (\$400.00) and payments on the note are now in arrears in the sum of One Thousand Six Hundred Dollars (\$1,600.00)."

8. "That the infant children have been provided for in the same manner and on the same standard as to which they became accustomed prior to the separation and divorce of the plaintiff from the defendant."

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9. "That without regard to the terms and provisions of the separation agreement between the plaintiff, James B. Zuccarello, and the defendant, Earline Owen Zuccarello, the minimum sum of One Thousand Dollars (\$1,000.00) per month is necessary to support the infant children, Jan Owen Zuccarello and James Bennett Zuccarello III, in the same manner and on the same standard to which they became accustomed prior to the separation and divorce of the plaintiff from the defendant."

10. "That the plaintiff, James B. Zuccarello, is a dentist specializing in full-mouth rehabilitation."

11. "That the gross annual income of the plaintiff, James B. Zuccarello, is between Sixty-five Thousand Dollars (\$65,000.00) and Seventy Thousand Dollars (\$70,000.00) and the plaintiff himself testified that his net income for the year 1968 before taxes was Twenty Thousand Dollars (\$20,000.00), that his net income before taxes for the year 1969 was Seventeen Thousand Dollars (\$17,000) and that his net income before taxes for the year 1970 was Twenty-six Thousand Dollars (\$26,000.00)."

12. "That the plaintiff, James B. Zuccarello, owns a one-half ( $\frac{1}{2}$ ) undivided interest in a clinic, which interest is worth between Fifteen Thousand Dollars (\$15,000.00) and Twenty Thousand Dollars (\$20,000.00)."

13. "That the plaintiff, James B. Zuccarello, is making monthly payments in the sum of Fifty-five Dollars Twenty-two cents (\$55.22) on a vacant lot at Beech Mountain, the original cost of which was Four Thousand Dollars (\$4,000.00), and the exact value of which is unknown."

14. "That the plaintiff's present monthly obligations and regular payments include payments on the separation agreement in the sum of One Thousand Dollars (\$1,000.00), principal and interest payment on notes in the sum of One Thousand Three Hundred Five Dollars Eighty-eight Cents (\$1,305.88), rent on his apartment in the sum of One Hundred Fifty Dollars (\$150.00), payments on the lot at Beech Mountain in the sum of Fifty-five Dollars Twenty-two Cents (\$55.22), country club dues in the sum of Forty Dollars (\$40), and insurance premiums in the sum of Sixty-nine Dollars (\$69.00)."

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15. "That the plaintiff, James B. Zuccarello, lives in an apartment in the City of Charlotte, North Carolina, for which he pays a monthly rental of One Hundred Fifty Dollars (\$150.00) and from which he commutes to his office in Concord, North Carolina, for a distance of between twenty (20) and twenty-five (25) miles."

16. "That the plaintiff, James B. Zuccarello, is an able-bodied man in good health, capable of working regularly."

17. "That the plaintiff, James B. Zuccarello, is able and capable of supporting his infant children in the same manner and on the same standard as to which they were accustomed prior to the separation and divorce of the plaintiff from the defendant."

18. "That the defendant, Earline Owen Zuccarello, did not work at public work prior to the separation of the plaintiff from the defendant; and that since the plaintiff divorced the defendant, the defendant has been working on a part-time basis as a kindergarten teacher and that her average monthly pay has been between One Hundred Fifty Dollars (\$150.00) and One Hundred Sixty Dollars (\$160.00) per month."

CONCLUSIONS OF LAW:

1. "That the defendant is entitled to an Order establishing the sum which the plaintiff, James B. Zuccarello, shall be required to pay for the support and maintenance of his infant children, Jan Owen Zuccarello and James Bennett Zuccarello III."

The court thereupon ordered that plaintiff pay \$1,000 per month for the support and maintenance of the children born of the marriage. Although plaintiff assigns as error the findings of fact, the conclusions of law, and the entry of the judgment, he argues only with respect to the amount of child support and does not refer in his argument or in his brief to any finding or conclusion with respect to custody, visitation privileges, or counsel fees. We have, therefore, omitted those portions of the judgment from consideration.

Plaintiff concedes that the separation agreement cannot deprive the courts of their inherent authority to protect the interests of infants but takes the position that the court failed to

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find sufficient facts of changed conditions upon which to increase the amount of child support from that set out in the separation agreement. Plaintiff relies on *Goodwin v. Snepp*, 10 N.C. App. 304, 178 S.E. 2d 231 (1971); *Rabon v. Ledbetter*, 9 N.C. App. 376, 176 S.E. 2d 372 (1970); and *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963), for his argument that where parties to a separation agreement agree with respect to support and maintenance of their minor children, there is a presumption that those provisions are just and reasonable, and the court may not alter them absent evidence of a change in conditions. Each of those cases is factually distinguishable from the case sub judice.

In this case, the court found as a fact that no order had ever been entered relating to the custody and support of the children. This finding cannot be controverted on the record.

There is evidence that when the separation agreement was entered into, the \$400 and \$600 monthly payments were intended to be child support. Defendant so testified. The inference is clear from plaintiff's pleadings and testimony. He says in his answer that he would like the court now to determine the \$400 monthly payments to be alimony. He also says that he had not been able to get the taxing authorities to allow him a deduction for alimony payments but the \$400 had been considered child support. The defendant testified without equivocation that *she* had no other income than the amount she earned as a kindergarten teacher. The clear inference is that the total payment of \$1,000 per month was intended to be child support.

We think the end result is that the court simply ordered the plaintiff to pay in child support exactly what he had agreed to pay for the support of his children. The findings of fact are supported by competent evidence and are sufficient to support the conclusions of law which do support the judgment. When this situation obtains, the judgment must be affirmed. *Little v. Little*, 9 N.C. App. 361, 176 S.E. 2d 521 (1970).

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

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STATE OF NORTH CAROLINA v. JOHN DENNY RUSH, JR.

No. 7218DC139

(Filed 23 February 1972)

**1. Criminal Law § 166— abandonment of assignments of error**

An assignment of error not brought forward and argued in the brief is deemed abandoned. Court of Appeals Rule 28.

**2. Courts § 15; Infants § 10— juvenile delinquency proceeding—self-incrimination**

Juvenile proceedings must be regarded as “criminal” for Fifth Amendment purposes of the privilege against self-incrimination.

**3. Infants § 10— juvenile delinquency proceeding— admission of confession**

Trial court’s findings that a juvenile voluntarily and understandingly confessed after having been advised of his constitutional rights were supported by competent evidence and are thus conclusive on appeal.

**4. Infants § 10— juvenile delinquency proceeding— admission of confession**

Considering the totality of the circumstances, neither a juvenile’s tender age nor the fact that his interrogation occurred in a school principal’s office rendered the conditions coercive so as to make the juvenile’s confession inadmissible.

**5. Criminal Law § 99; Infants § 10— juvenile delinquency proceeding— expression of opinion by court— G.S. 1-180**

The provisions of G.S. 1-180 prohibiting a court from giving an opinion on the evidence do not apply in a juvenile delinquency proceeding where no jury is present.

**6. Infants § 10— juvenile delinquency hearing— questions by trial court**

The trial judge in a juvenile delinquency proceeding may question the witnesses to elicit relevant testimony and to aid in arriving at the truth.

**7. Infants § 10; Robbery § 3— common law robbery— competency of knife used in robbery**

Although a juvenile petition did not allege that the juvenile used a weapon in committing a robbery, a knife used in the robbery and statements relating thereto were competent for the purpose of proving that the victim was intimidated or put in fear.

**8. Infants § 10; Robbery § 4— common law robbery— evidence that victim was put in fear**

Evidence that juvenile took money from another at the point of a knife was sufficient to prove the essential element of common law robbery that the victim was put in fear.

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**9. Infants § 10— commitment for delinquency — sufficiency of evidence**

There was sufficient evidence to permit a finding that appellant is a delinquent child under G.S. 7A-278(2) where the evidence was sufficient to have convicted him of the common law robbery alleged in the juvenile petition.

**10. Infants § 10; Robbery § 2— juvenile petition — common law robbery**

Petition alleging that a juvenile took money from the victim by putting him "in fear and in danger of his life" was sufficient to allege common law robbery without including the word "violence."

**11. Infants § 10; Arrest and Bail § 9— juvenile commitment — custody pending appeal— right to bail**

The district court did not err in committing a juvenile to the temporary custody of the Board of Juvenile Corrections without privilege of bond pending disposition of his case on appeal.

APPEAL by juvenile respondent from *Gentry, District Judge*, 22 October 1971 Session of GUILFORD District Court.

This proceeding was instituted pursuant to the provisions of Article 23 of Chapter 7A of the General Statutes. As provided by G.S. 7A-281 a petition was filed on 12 October 1971 alleging in substance that John Denny Rush, Jr. (respondent) is less than 16 years of age; that he resides at his father's address within the district; that he is a "delinquent child" as defined by G.S. 7A-278(2) in that he "did unlawfully, wilfully, and feloniously did make and (sic) assault on Conrad Randall Huffman at Lindley Junior High School located at 2201 Spring Garden Street, Greensboro, North Carolina and him in bodily fear and danger of his life did put, and did take from the said person of Conrad Randall Huffman .05¢ five cents in lawful money and then and there did unlawfully, wilfully, feloniously take, steal and carry away the said five cents"; and that the court should determine whether he is in need of the care, protection or discipline of the State. In accordance with G.S. 7A-284 a detention order was executed that same day wherein the court assumed immediate custody of the child prior to a hearing on the merits of the case. On 15 October 1971 the respondent was adjudged an indigent, and a public defender was appointed to serve as counsel for him. On 27 October 1971 a hearing was conducted with the respondent, his attorney, his father and others in attendance. The State's evidence tended to show that on 11 October 1971 at about 3:30 o'clock in the afternoon at the school ground respondent asked Conrad Huffman for a dime to ride the city bus; that Conrad pulled out a dime and gave it

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to respondent; that respondent then pulled out the open blade of a "Barlow" knife, put it against Conrad's back and asked for a nickel which he gave to him; and that Charles Hicks, who witnessed the robbery, corroborated Conrad's testimony. A voir dire examination was conducted wherein the court determined that on the day following the incident, a police officer interviewed respondent at the school in the presence of the assistant principal. Based upon respondent's own testimony and that of the officer, the court concluded: That the respondent was advised of his constitutional rights; that he voluntarily and understandingly waived those rights in writing; and, therefore, his confession as recited to the officer was admissible into evidence. The officer also testified that respondent had directed him to the place in the school building where he had hidden the "Barlow" knife used in the robbery. At the close of the State's evidence, respondent moved to dismiss the petition as of nonsuit. Respondent offered no evidence but renewed his motion to dismiss as of nonsuit. At the conclusion of the adjudicatory part of the proceedings, the court entered findings that the respondent did violate the law, was a delinquent child and was in need of the discipline and supervision of the State. The court denied respondent's motion to set the verdict aside.

Prior to disposition, the court heard evidence from respondent's father which tended to show that respondent's mother was deceased; that he lived alone with his father; that he was left in the care of a neighbor each morning when his father left for work at 7:00 a.m.; that his father had petitioned the court to appoint a guardian for him; and that after his father learned that he was accused of robbery, he "whipped him because of this. I tried to kill him. I can't tell the court what I did but I did beat him. Yes, I did whip him. I really did." Prior to any disposition the court also heard testimony from the principal which tended to show that the respondent had been an almost daily discipline problem; that he was large for his age and picked on the smaller children; that he had been in the office about every day; that each child received a printed Code of Conduct which prohibited carrying weapons to school but three "Barlow" knives found at school were traced to the respondent; that he had been sent out of his classroom for misbehavior approximately 15 times; that the principal and the assistant principal had talked with respondent numerous times

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concerning his behavior; and that he had been expelled from school on 14 October 1971 following the incident in controversy.

Based upon this evidence concerning disposition, the court ordered the respondent delinquent child be committed to the North Carolina Board of Juvenile Correction for an indefinite term. Respondent's motion to arrest judgment was denied, and he gave notice of appeal to this Court. Upon finding that for the protection of the community and the best interests of the respondent, he should be placed in custody of the Board of Juvenile Corrections pending disposition of the case on appeal, the district court entered an order accordingly.

*Attorney General Morgan, by Assistant Attorney General Hensey, for the State.*

*D. Lamar Dowda for the respondent appellant.*

MORRIS, Judge.

[1] Appellant's first assignment of error alleging that G.S. 7A-278 is unconstitutional was not brought forward and argued in his brief and is thus deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[2-4] Appellant questions the finding by the court that his statement to the police officer was voluntarily given and admissible into evidence. Though juvenile proceedings in this State are not criminal prosecutions and a finding of delinquency in a juvenile hearing is not synonymous with the conviction of a crime, a juvenile is entitled to certain constitutional safeguards and fairness. *In re Jones*, 11 N.C. App. 437, 181 S.E. 2d 162 (1971). For instance, juvenile proceedings must be regarded as "criminal" for Fifth Amendment purposes of the privilege against self-incrimination. *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), affirmed 403 U.S. 528, 29 L.Ed. 2d 647, 91 S.Ct. 1976 (1971). The State's evidence tends to show that the police officer advised appellant prior to questioning him that his constitutional rights included "... a right to remain silent and anything he said could and would be used against him in a court of law." A written waiver of his constitutional rights was introduced into evidence. The trial court then conducted a voir dire examination to determine whether appellant freely, voluntarily and understandingly confessed. Appel-

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lant testified on voir dire that he was called to the principal's office where the officer was identified and "In the office he told me anything I said could be used against me." Appellant then testified as follows:

"Q. Say what you recall Officer Smithey having said to you?

A. He told me I had the right to remain silent because anything that I said could be used against me, and if I wanted a lawyer the court—if my father could not afford me one the lawyer—I mean the court would give me one.

Q. What else?

A. He added some more things but I can't recall.

Q. Did he ask you to read this form?

A. No.

Q. Did he read this paragraph to you, 'I have read the above statements of my rights'?

A. Yes.

Q. Did you tell him you understood what that meant?

A. Yes.

Q. Did you, in fact, understand that you were entitled to have someone like me or a lawyer there present when you were talking?

A. Yes.

Q. You did not understand that it was for the trial of the case as opposed to that interrogation there?

A. I didn't understand all of that, but I kind of got what he was talking about.

Q. What do you mean you kind of got, what did you understand it to mean?

A. I understand parts of what he was saying about anything that I said could be used against me, and if my father couldn't afford me a lawyer the court would appoint me one."

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During this same voir dire examination the appellant testified for a third time that he understood he had a right to remain silent and the court would appoint a lawyer for him if he could not afford one. The court denied appellant's motion to exclude the confession and entered a finding that appellant voluntarily and understandingly confessed after having been fully advised of his constitutional rights. Though both State and appellant offered evidence on voir dire, there was no real conflict in the testimony as to the voluntariness of the confession. The trial court's findings are adequately supported by competent evidence and thus are conclusive on appeal. *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968). Considering the totality of the circumstances, neither of the appellant's tender age nor the place of the interrogation rendered the conditions so coercive as to make the confession inadmissible. *In re Ingram*, 8 N.C. App. 266, 174 S.E. 2d 89 (1970); see also 87 A.L.R. 2d 624; 47 Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children, § 50, p. 1024.

[5, 6] Appellant contends it was error for the court repeatedly to propound questions to various witnesses throughout this juvenile proceeding in violation of G.S. 1-180. This juvenile hearing to determine delinquency was heard by a judge without a jury and G.S. 1-180 does not apply where no jury is present. *State v. Butcher*, 10 N.C. App. 93, 177 S.E. 2d 924 (1970). The purpose of Article 23 as set out in G.S. 7A-277 is "to provide procedures and resources for children under the age of sixteen years which are different in purpose and philosophy from the procedures applicable to criminal cases involving adults." See *In re Whichard*, 8 N.C. App. 154, 174 S.E. 2d 281, appeal dismissed 276 N.C. 727 (1970). G.S. 7A-285 provides that "The juvenile hearing shall be a simple judicial process designed to adjudicate the existence or nonexistence of any of the conditions defined by G.S. 7A-278(1) through (5) which have been alleged to exist, . . . ." We believe the informal procedure contemplated by the statute allows the questioning of witnesses by the trial judge to elicit relevant testimony and to aid in arriving at the truth. The record discloses complete fairness on the part of the court in asking the witnesses questions, and we find no bias on the part of the trial judge. Since there was no prejudicial error shown, appellant's assignment of error is overruled.

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[7] By appellant's next assignments of error, he contends the court erred when it admitted into evidence a knife and statements related thereto, because the petition made no allegation that a weapon was used. Appellant cites no authority for the proposition and concedes that whether a child commits common law robbery or armed robbery is of no consequence in a juvenile hearing since a child may be declared a delinquent for committing "any criminal offense under State law." G.S. 7A-278(2). The gist of the offense of common law robbery is the taking by intimidation or violence. *State v. Stewart*, 255 N.C. 571, 122 S.E. 2d 355 (1961). Weapons may be admitted where there is evidence tending to show that they were used in the commission of a crime. *State v. Russ*, 2 N.C. App. 377, 163 S.E. 2d 84 (1968); *State v. Ashford*, 7 N.C. App. 320, 172 S.E. 2d 83 (1970), cert. denied 276 N.C. 498 (1970). Evidence of a knife is competent for the purpose of proving intimidation or the putting in fear. We find no prejudicial error, and the assignment of error is overruled.

[8, 9] Appellant's next assignment of error questions the sufficiency of the evidence to withstand his motion to dismiss the petition as of nonsuit. Appellant contends that there was no evidence that the victim, Conrad Huffman, was put in fear and, therefore, an essential element of the offense of common law robbery is missing. *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595 (1964).

" . . . 'No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear.' (Citations omitted.)" *State v. Norris*, 264 N.C. 470, 473, 141 S.E. 2d 869 (1965).

6 Strong, N. C. Index 2d, Robbery, §§ 1-5, pp. 678-687.

"Fear will be presumed if there are just grounds for it." *State v. Keyes*, 8 N.C. App. 677, 679, 175 S.E. 2d 357, cert. denied 277 N.C. 116 (1970).

There is also plenary evidence to show a felonious intent on appellant's part permanently to deprive Conrad Huffman of his

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money and to convert it to his own use. *State v. Mundy*, 265 N.C. 528, 144 S.E. 2d 572 (1965); *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966). Clearly since there was sufficient evidence to convict appellant of the crime alleged in the petition, then there was sufficient evidence to permit a finding that appellant is a delinquent child under G.S. 7A-278(2) and appellant's motion to dismiss was properly denied. *In re Roberts*, 8 N.C. App. 513, 174 S.E. 2d 667 (1970); *In re Alexander*, 8 N.C. App. 517, 174 S.E. 2d 664 (1970). Similarly the court did not err in failing to set the judgment aside.

**[10]** Appellant also argues that the petition itself was insufficient to support the court's order, and therefore, the court erred in failing to arrest judgment. We disagree. The petition here charging "him in bodily fear and danger of his life did put" sufficiently alleged the gist of the offense without including the word "violence." *State v. Stewart, supra*; *State v. Lawrence, supra*. The petition adequately charged a criminal offense, and we find no fatal defect on the face of the record.

Appellant's assignment of error No. 10 questions what evidence a court may consider concerning the needs of the child during the disposition part of the hearing and his assignment of error No. 11 questions whether the court may immediately proceed to disposition following an adjudication. In applying the statutory language of G.S. 7A-285, we find no error.

**[11]** Finally appellant contends that the court erred in committing him to the temporary custody of the North Carolina Board of Juvenile Corrections without the privilege of bond pending disposition of his case on appeal. This court has specifically determined this issue previously in *In re Martin*, 9 N.C. App. 576, 176 S.E. 2d 849 (1970), and the assignment of error is overruled.

Unfortunate as the circumstances of this case may be, the record fails to show any reversible error. The juvenile appellant in this case was afforded every constitutional safeguard required at every stage of the proceedings.

Affirmed.

Chief Judge MALLARD and Judge PARKER concur.

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Oil Co. v. Riggs

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ILDERTON OIL COMPANY v. R. J. RIGGS, NORMAN L. GRUBB  
AND ELLER AND SLATE OIL CO., INC.

No. 7218DC178

(Filed 23 February 1972)

1. Landlord and Tenant § 7— removal of trade fixtures — right of third party

An oil company which placed an underground storage tank, pump and accessory equipment on leased premises under agreement with the tenant had the same right to remove them as the tenant would have had if the tenant had owned them.

2. Landlord and Tenant § 7— leased property — trade fixtures — removal by third party — abandonment to landlord

Where an oil company, under an agreement with the tenant, placed an underground storage tank and accessory equipment on the leased premises for storage and dispensation of diesel fuel supplied by the oil company to the tenant for use in the tenant's vehicles, the tenant and the oil company expressly agreed that the tank and equipment would remain the property of the oil company, the tenant was told by the landlord that the tank could be put anywhere on the property as long as allowance was made for proper parking, and after the tenant's lease expired the oil company tried unsuccessfully to become the new tenant's diesel fuel supplier and to sell the tank and equipment to the new tenant's supplier, it was *held* (1) that at the time of installation all the parties intended that the tank and equipment were to be removable as trade fixtures, and (2) that the oil company did not relinquish or abandon them to the landlord by its failure to remove them prior to the expiration of the tenant's lease and the tenant's surrender of the premises.

APPEAL by plaintiff from *Carrington*, District Judge, 21 December 1971 Session of District Court held in GUILFORD County.

*Haworth, Riggs, Kuhn & Haworth* by John Haworth for plaintiff appellant.

*Bencini, Wyatt, Early & Harris* by A. Doyle Early, Jr., for defendant appellees.

MALLARD, Chief Judge.

There is no controversy about the facts found by the judge. They are stated by appellant in its brief, and concurred in by the defendants, as follows:

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"Before 5 January 1971 CLC RENTALS, INC. (CLC) leased as tenant by (sic) the defendant R. J. RIGGS (RIGGS) the land and buildings located at 2011 Bethel Drive in High Point. Shortly before that date CLC entered into an oral agreement with plaintiff whereby plaintiff supplied diesel fuel to CLC at agreed prices. As part of the transaction plaintiff at its own expense procured and installed on the leased premises an underground storage tank with pump and accessory equipment where diesel fuel supplied to CLC was stored and from which it was dispensed to CLC vehicles. It was agreed orally between CLC and plaintiff that the tank, pump and equipment would remain the property of the plaintiff and would be removed by plaintiff when CLC discontinued using the premises.

There was no agreement between plaintiff and RIGGS as to the installation or removal of the tank. Before the tank was installed, however, JOHN L. MURROW, JR., Vice-President of CLC, told RIGGS he was thinking about putting a tank on the property, asked RIGGS for suggestions as to where it should be put, and was informed by RIGGS to 'put it anywhere as long as he allowed for proper parking.' RIGGS did not know the tank and equipment had been installed and did not know of the plaintiff's part in the installation until after CLC's lease had terminated.

Plaintiff continued to supply fuel to CLC and to use the tank and equipment in that connection until CLC vacated the premises. Thereupon plaintiff attempted to sell fuel to RIGGS' new tenant, the defendant NORMAN L. GRUBB (GRUBB). Upon being unsuccessful in making an agreement with GRUBB, plaintiff attempted to sell the tank and equipment to GRUBB's fuel supplier, the defendant ELLER AND SLATE OIL Co., INC. (ELLER AND SLATE). When no agreement could be made as to sale of the tank and equipment plaintiff began to remove it from the premises.

After the pump and some of the equipment had been removed RIGGS forbade removal of the tank and remaining equipment. Since 5 or 6 August 1971 GRUBB AND ELLER AND SLATE have been using the tank and equipment to store and dispense fuel being used by GRUBB and supplied by ELLER AND SLATE. This usage of the tank and equipment has been

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made without plaintiff's permission and no compensation has been paid to plaintiff, either for the tank and equipment or for its use.

Upon being prohibited by RIGGS from removing the tank and remaining equipment plaintiff instituted this action to recover possession of the tank and equipment or in the alternative to recover its reasonable value. Installation of the tank involved excavating a hole in the ground, inserting the tank and covering the tank with dirt. Its removal involves nothing more than excavating and removing the tank and refilling the hole in the ground from which it is taken, a procedure customarily, generally and often performed in the trade. Any damages resulting to the premises from such removal can be compensated by a monetary award."

The plaintiff contends that the trial judge committed error in concluding as a matter of law that the underground storage tank and accessory equipment had become the property of Riggs and that the plaintiff had no right to remove them. The plaintiff further contends that the trial court erred in allowing the motion of the defendants for summary judgment and dismissing the action with prejudice.

"In disputes between landlord and tenant, there is a general presumption that the tenant, by annexing fixtures, did so for his own benefit and not to enrich the freehold, and the law accordingly construes the tenant's right to remove his annexations liberally, at least where removal may be effected without material injury to the freehold." 35 Am. Jur. 2d, Fixtures, § 35, pp. 727, 728. See also, *Brunswick-Balke-Collender Co. v. Bowling Alleys*, 204 N.C. 609, 169 S.E. 186 (1933).

"Generally, what constitutes a trade fixture depends on the facts of the particular case, but an article may generally be regarded as a trade fixture if it is annexed for the purpose of aiding in the conduct by the tenant of a calling exercised on the leased premises for the purpose of pecuniary profit." 36A C.J.S., Fixtures, § 38(b), p. 690.

It is clear that the tank, pump and accessory equipment were placed on Riggs' land by plaintiff at the request of CLC, the tenant of Riggs, and that they were trade fixtures to be used by the tenant in the conduct of its business on the leased

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premises. As there is no finding or contention to the contrary, we assume that CLC was using the premises for the purpose of pecuniary profit.

[1] The plaintiff in this case had the same right to remove the underground storage tank, pump and accessory equipment that CLC, the lessee, would have had, had it owned them. *Williams v. Wallace*, 260 N.C. 537, 133 S.E. 2d 178 (1963). See also, 36A C.J.S., Fixtures, § 42. There was no written or orally expressed agreement between Riggs and CLC or between Riggs and the plaintiff with respect to the removal of the tank and equipment. "The question whether an improvement remains as a removable trade fixture is frequently said to be one of intent." 36A C.J.S., Fixtures, § 38, p. 688. See also, *Haywood v. Briggs*, 227 N.C. 108, 41 S.E. 2d 289 (1947).

[2] CLC, the original tenant, expressly agreed with plaintiff that the tank, pump and accessory equipment would be and remain the property of plaintiff. CLC, before having the tank, pump and accessory equipment installed, contacted Riggs, asked if he had any suggestions as to where to put the tank, and was told that it could be put anywhere as long as allowance was made for proper parking. We hold that under these and the other circumstances of this case, it was, at the time of installation, the intent of the landlord, the tenant, and the plaintiff that the tank, pump and accessory equipment were to be removable as trade fixtures.

The case before us is distinguishable from *Stephens v. Carter*, 246 N.C. 318, 98 S.E. 2d 311 (1957). In *Stephens*, the plaintiff sought to recover two underground gasoline storage tanks that were used in connection with the operation of a filling station and were located on the premises. These tanks had been orally conveyed to plaintiff by the owner of the realty, but thereafter, and before Stephens had removed the tanks, the owner, by deed, conveyed the entire premises to another without reservation. The tanks had been installed by a previous owner of the realty. The Court held that the tanks were a part of the realty and could be conveyed only by a written instrument. In so holding, the Court quoted from *Springs v. Refining Company*, 205 N.C. 444, 171 S.E. 635 (1933), where the distinction between fixtures attached to land by the owner and fixtures attached to land for purposes of trade by a tenant is pointed out.

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The defendant Riggs contends, however, that even if the tank, pump and accessory equipment were trade fixtures, and even if plaintiff had the same right to remove them that CLC had, CLC could have removed trade fixtures only within the term of its lease.

The trial judge, in finding the facts, also found that "on or about August 1, 1971," the lease of CLC expired and Riggs, at that time, leased the premises to Grubb. Plaintiff did not remove the fixtures within the term of the lease of CLC but attempted unsuccessfully to negotiate an agreement to supply diesel fuel oil to the new tenant. From the facts found, it appears that plaintiff had offered to sell the tank, pump and accessory equipment to the new tenant's diesel oil supplier, Eller and Slate, and when it could not sell to Eller and Slate, went upon the premises and began to remove the tank and accessory equipment, and was stopped from doing so by Riggs. Since August 5 or 6, 1971, Grubb and Eller and Slate have been using the tank to store diesel fuel to be used in Grubb's vehicles.

The rule with respect to the question of when a lessee must remove a trade fixture attached to the land is set forth by Justice Ruffin (later Chief Justice) in the case of *Pemberton v. King*, 13 N.C. 376 (1828-1830), as follows:

" \* \* \* The general rule is that any erection, even by the tenant, for the better enjoyment of the land becomes part of the land; but if it be purely for the exercise of a trade, or for the mixed purpose of trade and agriculture, it belongs to the tenant, and may be severed during the term, or after its expiration, though in the latter case the tenant will be guilty of a trespass in entering the land for that purpose, and in that respect only. \* \* \* " (Emphasis added.)

Thereafter, in *Smithwick v. Ellison*, 24 N.C. 326 (1842), the Supreme Court, without mentioning *Pemberton*, said:

" \* \* \* Whatever things the tenant has a right to remove ought to be removed within the term; for, if the tenant leave the premises without removing them, they then become the property of the reversioner. But where the tenant holds over, even so as to become a trespasser, he will not be considered as having abandoned the things he had a right to remove. \* \* \* "

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In *R.R. v. Deal*, 90 N.C. 110 (1884), the plaintiff, under its charter and verbal license from defendant's ancestor, had built a house for a depot on certain lands. Thereafter the plaintiff abandoned the line and removed its tracks to a new location but left the depot building at the original location. Two years after the abandonment of the old line, the defendant entered and took possession of the depot building. The Court cited *Pemberton v. King*, *supra*, in holding that the defendant did not own the building and that plaintiff had the right to remove it, and said:

"It is the policy of the law to encourage trade, manufactures, and transportation, by affording them all reasonable facilities. Buildings, fixtures, machinery, and such things, certainly intended and calculated to promote them, are treated, not as part of the land, but distinct from it, belonging to the tenant, to be disposed of or removed at his will and pleasure. Hence if a house, or other structure, is erected upon land only for the exercise of trade or the mixed purpose of trade and agriculture, no matter how it may be attached to it, it belongs to the tenant, and may be removed by him during his term, and in some classes of cases, after it is ended; though the tenant, after his term is over, would, in going back upon the land to get his property, be guilty of trespass in going on the land, and only in that respect, the property would remain his.

The exceptions to the general rule pointed out above are well settled, and the practical difficulty in any case arises in pointing out when the general rule, or the exception, applies. The exception does not depend upon the character of the structure or thing erected, or whether it is built of one material or another, or whether it be set in the earth or upon it, but whether it is for the purpose of trade or manufacture, and not intended to become identified with and part of the land; this is the test. (Citations omitted.)

\* \* \*

There are authorities which decide that the tenant may remove the buildings while he remains in possession of the land, but not after he has yielded possession thereof. These go upon the ground that if the tenant neglect to avail himself of his right within the period of his term, the law presumes that he voluntarily relinquished or abandoned

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his claim in favor of the landlord, but such presumption cannot arise, where the facts and circumstances, and the nature of the property, and the uses to which it is devoted, combine to rebut such a presumption. If the tenant yields possession and leaves the structure standing, this fact may be evidence that it was not used or intended only for the purpose of trade or manufacture, or of abandonment of it, but it could not change the established character of the property.

The character of the structure, its purpose and the circumstances under which it was erected, the understanding and agreement of the parties at the time the erection was made, must all be considered in determining whether it became a part of the freehold or not."

The apparent contradictions with respect to the right of a tenant or lessee to remove a trade fixture after he has surrendered and left the leased premises appearing in *Pemberton* and *Smithwick* seem to have been clarified in *R.R. v. Deal, supra*. All three of these cases are cited in *Springs* and *Stephens*.

Upon consideration of the facts in the case before us, we think that when the tank, pump and accessory equipment were placed on the premises, the parties did not intend for them to become identified with and a part of the land, and that the circumstances of this case, the nature of the property involved, and the uses to which the property was devoted combine to rebut the presumption that there was a relinquishment or abandonment of the tank and equipment by CLC and the plaintiff.

We hold, therefore, that the rule set forth in *R.R. v. Deal, supra*, is applicable to the facts in this case, and that the trial judge committed error in concluding *as a matter of law* that Riggs had become the owner of the tank and accessory equipment. See also, *Ingold v. Assurance Co.*, 230 N.C. 142, 52 S.E. 2d 366 (1949); *Belvin v. Paper Co.*, 123 N.C. 138, 31 S.E. 655 (1898); *Overman v. Sasser*, 107 N.C. 432, 12 S.E. 64 (1890); *Feimster v. Johnson*, 64 N.C. 259 (1870); Annot. 6 A.L.R. 2d 322; 1 Restatement of Torts 2d, §§ 177, 178, 180.

The trial judge committed error in allowing the motion of the defendants for summary judgment.

Reversed.

Judges MORRIS and PARKER concur.

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STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION AND CENTRAL TRANSPORT, INC., MAYBELLE TRANSPORT COMPANY, CHEMICAL LEAMAN TANK LINES, AND PUBLIC TRANSPORT CORPORATION, INTERVENORS IN OPPOSITION TO AMENDMENT v. ASSOCIATED PETROLEUM CARRIERS, KENAN TRANSPORT COMPANY, O'BOYLE TANK LINES, INC. AND A. C. WIDENHOUSE, INC., INTERVENORS IN SUPPORT OF AMENDMENT

No. 7110UC462

(Filed 23 February 1972)

**1. Carriers § 2; Utilities Commission § 3— motor carriers — rule defining petroleum products — amendment**

There was competent, material and substantial evidence to support the Utilities Commission's amendment of a rule applicable to carriers of liquid petroleum in bulk in tank trucks by redefining petroleum products as "those derived from the mainstream of the crude oil and natural gas, containing only the elements of carbon and hydrogen," and by listing products which come within that definition.

**2. Carriers § 2; Utilities Commission § 3— motor carriers — State and national transportation policy — adoption of I.C.C. rule**

Statutes declaring it to be State policy to cooperate with national transportation policy and coordination of interstate and intrastate public utility services, G.S. 62-2 and G.S. 62-259, do not require the North Carolina Utilities Commission to adopt a rule of the Interstate Commerce Commission with respect to motor carriers.

**3. Carriers § 2; Utilities Commission § 3— rule defining petroleum products — finding of Utilities Commission**

In this hearing upon a proposed amendment of a Utilities Commission rule defining and listing products which may be carried under a petroleum authority, there was competent, substantial and material evidence to support a finding by the Commission that the fact that the certificates of liquid petroleum carriers in bulk in tank trucks limit the transportation of petroleum products, other than gasoline, kerosene, fuel oils and naphthas, to originations from specified "originating terminals" renders it unlikely that such carriers would have the opportunity, under their existing petroleum authority, to transport many of the commodities listed either in the amendment supported by appellants or the amendment adopted by the Commission.

**4. Carriers § 2; Utilities Commission § 3— rule defining petroleum products — finding of Utilities Commission**

There was sufficient evidence to support the Utilities Commission's finding that adoption of the definition of "petroleum products" proposed by appellants would have the effect of granting new authority to a large number of petroleum carriers without a showing of public convenience and necessity.

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**5. Utilities Commission § 6— hearings — informality**

Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Utilities Commission must be more or less informal and not confined by technical rules in order that regulation may be consistent with changing conditions.

**6. Utilities Commission § 6— enlargement or restriction of inquiry**

The Utilities Commission may enlarge or restrict the inquiry before it unless a party is clearly prejudiced thereby.

**7. Carriers § 2; Utilities Commission § 3— amendment to rule defining petroleum products — adequacy of notice**

In this hearing on a proposed amendment of a Utilities Commission rule defining and listing products which may be carried under a petroleum authority, appellant's contention that the Commission's adoption of an amendment introduced by appellees at the hearing, rather than the proposed amendment attached to the notice of hearing, restricted the authorities of appellants without adequate notice *is held* without merit, appellants having been given ample notice that appellees contended that many of the items listed in the proposed amendment were not true petroleum products and that adoption of the proposed list would enlarge appellants' authority without a hearing as to public convenience and necessity, and there being no evidence that appellants have transported or attempted to transport any commodity not included within the adopted amendment.

**8. Utilities Commission § 6— adoption of rules — finding of reasonableness**

In adopting a rule pursuant to G.S. 62-31, the Utilities Commission need not make a finding of fact that the rule is reasonable and necessary in order for it to administer and enforce the provisions of the Public Utilities Act.

**9. Evidence § 48; Utilities Commission § 6— admission of expert testimony — failure to find witness is expert**

In this rule making proceeding, the Utilities Commission did not err in the admission of expert opinion evidence without a specific finding that the witness was an expert, since the admission of the evidence over objection and the denial of a motion to strike constituted the Commission's ruling that the witness was qualified as an expert.

**10. Utilities Commission § 6— expert testimony—filing in advance**

In this rule making proceeding, a Utilities Commission rule did not require that the testimony of expert witnesses presented by appellees be in writing and filed with the Commission in advance, there being no testimony or exhibits of the complexity or nature described in the rule.

**11. Carriers § 2; Utilities Commission § 3— notice of proposed rule amendment — adoption of more restrictive amendment — adequacy of notice to nonparticipants in hearing**

In this hearing upon a proposed amendment to a Utilities Commission rule defining and listing products which may be carried

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under a motor carrier petroleum authority, notice of the hearing with an attached copy of the proposed amendment constituted sufficient notice to carriers who did not participate in the hearing of the Commission's entry of a order amending the rule in a more restrictive manner than the amendment proposed and attached to the notice, where the Commission found upon competent evidence that the fact that the existing certificates of petroleum carriers limit the transportation of petroleum products, other than gasoline, kerosene, fuel oils and naphthas, to originations from certain specific "originating terminals" would render it unlikely that such carriers would ever have the opportunity, under their existing petroleum authority, to transport many of the commodities listed either in the proposed amendment or the amendment adopted by the Commission.

APPEAL by Intervenors in support of amendment from order of North Carolina Utilities Commission in Docket No. M-100, Sub 31, dated 4 January 1971.

This is a rule making proceeding instituted by the Utilities Commission on its own motion by its order dated 25 March 1970. The order was served on all intrastate certificated and permitted carriers of petroleum and petroleum products, liquid, in bulk in tank trucks, and notified them "that the Commission has under consideration the adoption of an amendment to Rule R2-37 of its motor carrier regulations as contained in Chapter 2 of the Rules and Regulations of the North Carolina Utilities Commission, as adopted in Docket No. M-100, Sub 1." A copy of the proposed amendment was attached to the order, and the carriers were advised "that any representations in favor of or against the proposed rule change must be submitted in writing (11 copies) to the Commission on or before April 20, 1970."

The order proposed to amend Group 3 of N.C.U.C. Rule R2-37, which is intended to describe the commodities which certificated and permitted carriers of petroleum and petroleum products, liquid, in bulk in tank trucks, may transport under the authority held by the carriers and granted by the Commission.

Group 3 of Rule R2-37 presently reads as follows: "Group 3. *Petroleum and Petroleum Products, Liquid, in Bulk in Tank Trucks.*—This group includes gasoline, kerosene, fuel oil, liquefied petroleum gas, toluene, toluol, xylene, xylol and other petroleum products in bulk in tank trucks."

The amendment proposed to be adopted read as follows: "Group 3. *Petroleum and Petroleum Products, Liquid, in Bulk*

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*in Tank Trucks.*—This group includes gasoline, kerosene, fuel oil, liquefied petroleum gas, tuluol, xylene, and xylol and all commodities, except asphalt and asphalt cutback, listed under Appendix XIII to I.C.C. Ex Parte MC-45, *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, as amended through March 15, 1970." Also attached to the order served was a list of petroleum and petroleum products as listed in Appendix XIII.

Appellants filed motions for intervention and statements in support of the adoption of the amendment. They alleged that the amendment would clarify those commodities which they as carriers could lawfully transport under their certificates and would not result in any enlargement of the Certificates of Operating Authority issued to those carriers presently authorized to transport petroleum and petroleum products, liquid, in bulk in tank trucks. Appellees filed motions in intervention and statements opposing the adoption of the amendment. They alleged that many of the commodities listed in the proposed amendment are not, in fact, petroleum or petroleum products and should not be included in the definition or listing of commodities under Group 3; and that if the amendment were adopted, the present carriers certificated to transport Group 3, Petroleum and Petroleum Products, would be granted the right to transport numerous commodities not within the contemplation of their certificates and without a showing of public convenience and necessity.

Appellants and appellees were represented at the hearing which was calendared for 29 April 1970, but, at the request of one of the appellees, continued to 29 July 1970. Evidence was presented by all parties. On 14 January 1971 the Commission issued its order which did not incorporate the proposed amendment to Group 3 originally proposed in the Commission's notice. Instead the Commission adopted a definition and list introduced at the hearing by the appellees. As adopted by the Commission, Group 3 reads as follows:

*"Petroleum and Petroleum Products, Liquid, in Bulk in Tank Trucks.* Petroleum products are defined as those derived from the mainstream of the crude oil and natural gas, containing only the elements of carbon and hydrogen, and unaltered by the addition of any atom or atoms of elements other than those of said carbon and hydrogen.

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Asphalt and asphalt cutback are not included in this group. The following named commodities are included in this group, together with any other commodities within the definition set out above:"

There followed a list of some 76 commodities. This list was a list introduced at the hearing by appellees (their Exhibit 2) as the only commodities which are petroleum products appearing on the proposed list of some 193 commodities which was proposed by the Commission under Appendix XIII.

Appellants filed exceptions and a motion for reconsideration and rehearing. The exceptions were overruled and the request for reconsideration and rehearing denied. Appellants filed exceptions and notice of appeal.

*Edward B. Hipp, Maurice W. Horne, and William E. Anderson for the North Carolina Utilities Commission.*

*Bailey, Dixon, Wooten and McDonald, by J. Ruffin Bailey and Ralph McDonald, for Intervenor in Support of Amendment, appellants.*

*R. Mayne Albright, for Public Transport Corporation, Intervenor in Opposition to Amendment, appellee.*

*Clawson L. Williams, Jr., for Central Transport, Inc., Maybelle Transport Company, and Chemical Leaman Tank Lines, for Intervenor in Opposition to Amendment, appellees.*

MORRIS, Judge.

The appellants first argue that the order adopted by the Commission is erroneous as a matter of law and is unsupported by competent, material, and substantial evidence in view of the entire record in that (a) the Commission failed to consider evidence that the definition was complex and difficult to apply, (b) the Commission failed to consider the national transportation policy and coordination of interstate and intrastate public utility services, and (c) the order was based upon the erroneous finding or conclusion that the amendment originally proposed would have enlarged the authorities of the appellants to the detriment of the appellees. Within this first argument and under (a) above, appellants contend that their exceptions to findings of fact Nos. 4 and 5 should be sustained. These findings are as follows:

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"(4) That for the guidance of the motor carriers and of the shipping public a definition of petroleum products and a list of commodities included under such definition are urgently needed and in the public interest.

(5) That the commodities in the list submitted and received in evidence as Protestants' Exhibit 2, contain only the elements of hydrogen and carbon in one combination or another and are true petroleum products, which along with a definition of 'petroleum products' should be shown under Group 3 of Rule R2-37 to the end that authorized motor carriers and the shipping public may know what such carriers may legally haul in intrastate commerce in North Carolina."

[1] G.S. 62-94(e) provides that "Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this chapter shall be *prima facie* just and reasonable." *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (1953). Section (b) of G.S. 62-94 provides that on appeal the court may reverse or modify the decision if *substantial rights* of appellant have been prejudiced because the Commission's findings, inferences, conclusions, or decision are unsupported by competent, material and substantial evidence in view of the entire record as submitted. The Commission staff testified—and their evidence in this respect was not contradicted—that confusion had existed with respect to Group 3 and that it had been necessary in the past to hold a hearing to determine whether a commodity for which a tariff had been filed was a petroleum product within the existing phraseology of Group 3 commodities. One staff member testified, in substance, that because of the confusion, the Commission directed its staff to make a study of the rules and present a recommendation with respect to an amendment to Group 3 which would more accurately and adequately describe petroleum and petroleum products. The staff did make a study and recommended that this rule making procedure be instituted for the purpose of adopting the proposed amendment to Rule R2-37, Group 3, as set out in the Commission's notice. The amendment as proposed would have included within the definition of petroleum and petroleum products, liquid, in bulk in tank trucks, all of those commodities, except asphalt and asphalt cutback, listed under Appendix XIII to I.C.C. Ex Parte MC-45, Descriptions

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in Motor Carrier Certificates, 61 M.C.C. 209, as amended through 15 March 1970. There was evidence from the Commission staff to the effect that they had no strong feeling about the adoption of the proposed amendment. Mr. Killian testified: "As far as I am concerned, I consider it was just a starting point. I thought that we had to do something, and this is the best solution we could think of. We thought that, if we could get it started and get it into the hearing room, any bugs in it would come out." Mr. Hughes, of the Commission staff, testified that in his opinion the best rule which could be adopted by the Commission would be the one identical to the Interstate Commerce Commission's rule. Both Mr. Killian and Mr. Hughes testified that the proposed rule was just a list, would not furnish any means of classifying new products coming on the market, and the list would become obsolete in a few years. Both also testified that it possibly would be helpful to the Commission if it had or adopted a definition of petroleum and petroleum products in addition to having a list. There was testimony from an expert witness that it would be helpful for one to have some knowledge of chemistry in determining whether a new commodity would come within the definition; that a person "totally unschooled in chemistry or in science" would not be able to make that determination, but that a person with no more than one or two years of college chemistry "should certainly be able to make a decision of this sort"; that a person who is trained should be able to do it almost by inspection without reference to a reference book; that he should, as a minimum, have a course in organic chemistry which would be a sophomore year course; that there are handbooks available in most public libraries listing pure chemical compounds; and that if products "fell into the category of being from crude oil, then there are reference works which would tell which things come from crude oil, and then by use of a handbook, one could find immediately whether it had any element other than carbon or hydrogen." Another expert witness testified that the definition proposed by respondents would certainly put very definite limits on what are petroleum products and further: "Well, this certainly would be a rigorous definition. It could be very easily determined whether or not a product was a petroleum product within this definition . . ." This witness also testified that in his opinion it would be much easier, even for a person not trained in organic chemistry, to get the information and determine whether a product

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would fit under the definition than to determine if it was on some list or could be made from petroleum. The evidence was uncontradicted that many of the items listed on the proposed Appendix XIII list were not true petroleum products, while the evidence of the chemists who testified was that the items listed on Protestants' Exhibit 2 contain only the elements of hydrogen and carbon and are, therefore, true petroleum products.

We think the Commission's findings of fact Nos. 4 and 5 are amply supported by competent, material, and substantial evidence.

[2] With respect to (b) above, appellants argue that the Commission's order was in obvious disregard of G.S. 62-2 and G.S. 62-259. G.S. 62-2 is entitled "Declaration of Policy." Among the ends sought to be achieved is "to cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utilities services, and to these ends, to vest authority in the Utilities Commission to regulate public utilities generally and their rates, services and operations, in the manner and in accordance with the policies set forth in this chapter." G.S. 62-259 is entitled "Additional Declaration of Policy for Motor Carriers" and contains, among others, this further policy: "And to conform with the national transportation policy and the federal motor carriers acts insofar as the same may be practical and adequate for application to intrastate commerce." We do not perceive that either of these phrases *requires* the North Carolina Utilities Commission to adopt a rule of the Interstate Commerce Commission. Certainly the Commission must make its own independent investigations, determinations and findings of fact based upon the evidence presented to it. We find no merit in appellants' contention.

[3, 4] With respect to (c) above, appellants contend that finding of fact No. 6 was not supported by the evidence. The finding is:

"(6) That the existing petroleum authorities, including the authority contained in the certificates of carriers party to this proceeding, limit the transportation of petroleum products, other than gasoline, kerosene, fuel oils and naphthas, to originations from certain specified 'originating terminals,' generally pipeline and marine terminals, which fact would render it unlikely that these carriers would ever have

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the opportunity, under their existing petroleum authority, to transport many of the commodities shown either in Appendix XIII or in Protestants' Exhibit 2 for the reason that such commodities are not shipped from the said specified 'originating terminals.' "

Mr. Killian, of the Commission staff, testified that, although there was disagreement on the point between him and Mr. Hughes, it was his own opinion that when a certificate authorized "transportation of petroleum and petroleum products in bulk in tank trucks from existing originating terminals at or near" a place or places, it meant the petroleum terminal and does not mean "some chemical place or some fertilizer manufacturing place like Carolina Nitrogen down at Wilmington." There was also evidence that the commodities which are shipped through pipelines to existing terminals in North Carolina are gasoline, kerosene, and fuel oil. It is obvious that the Commission adopted this interpretation of the wording of the certificates issued by it as its own. Appellant also contends that there was no evidence to support the Commission's conclusion that adoption of Appendix XIII, the original proposed amendment, would have the effect of granting new authority to appellants and other petroleum carriers. There was no evidence that any product not conceded to be a true petroleum product had ever been transported by any of the appellants under their existing authority. The evidence was that they had transported under their authorities only the true petroleum products. There was evidence that to amend Group 3 to include commodities other than those which are true petroleum products would have the effect of granting new authority to a large number of existing petroleum carriers without a showing of public convenience and necessity. The first such evidence came from Mr. Hughes of the Commission staff: "As it stands now, under the Commission's interpretation, an intrastate carrier can't transport, under a certificate for petroleum products, anhydrous ammonia. If Appendix XIII were adopted, he could. This would probably be true of many other commodities contained in Appendix XIII. To that extent, it would give that intrastate carrier additional authority to what he now holds, without any showing of public convenience and necessity." This contention is also without merit.

Appellants next contend that the order entered by the Commission was erroneous as a matter of law because it (a) re-

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stricted the authorities of appellants without the notice required by G.S. 62-43 and G.S. 62-80, and (b) failed to find or conclude, as required by G.S. 62-31, that the rule adopted was reasonable and necessary to enable it to administer and enforce the provisions of the Public Utilities Act. We find no merit in either position.

G.S. 62-43 authorizes the Commission, after notice and hearing, and upon its own motion or upon complaint, to ascertain and fix just and reasonable standards, classifications, regulations, practices, or service to be furnished, imposed, observed or followed by one or all public utilities. G.S. 62-80 provides:

“The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.”

Appellants contend that the notice given contained no indication that the existing rule might be restricted. They take the position that the order adopted changed the wording of the rule and adopted a restrictive definition, the effect of which is to deprive the appellants and other petroleum carriers of the right to transport commodities which they were authorized to transport under the existing rule.

[5-7] Since the regulation of public utilities is a continuing and continuous process as to each utility, procedure before the Commission must be more or less informal and not confined by technical rules in order that regulation may be consistent with changing conditions. The Commission may enlarge or restrict the inquiry before it unless a party is clearly prejudiced thereby. *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325 (1962). The evidence was uncontradicted that the Commission and the haulers had been experiencing difficulty with the existing rule. Staff testimony was that it was not the idea of the Commission that the proposed amendment was the only answer, but it was their thinking that it would be advisable to get the matter into hearing and try to work out something which would obviate the necessity for separate hearings

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with respect to individual commodities as had been necessitated by the wording of the existing rule. That a classification proceeding would eventually be necessary was recognized in the order entered in Docket No. T-1277, Applications of Beard-Laney, Inc. et al, Fifty-Third Report of the North Carolina Utilities Commission July 1, 1962-December 31, 1963, p. 133. In that proceeding, a number of carriers had applied for amendment to their previously granted petroleum and petroleum products authority in such a manner as to allow them to transport "between all points and places within the State of North Carolina" rather than merely "from all existing originating terminals . . . to points and places throughout the State of North Carolina." There was evidence that hexane, transformer oil, waxes, xylol and coal spray oils are petroleum products. In its order the Commission said: "Be that as it may, *until such time as determination is made in a proper proceeding as to what family many of these items properly belong*, and in the absence of a showing at this time to the contrary, it seems ill-advised to grant authority for the transportation of them under the guise of petroleum products." (Emphasis supplied.) (p. 135.) The motions and pleadings filed by respondents in this proceeding gave ample notice that protestants took the position that many of the items listed on the Appendix XIII were not true petroleum products and, therefore, the adoption of the proposed list would enlarge appellants' authority without a hearing as to public convenience and necessity. Additionally there is no evidence that appellants had ever transported or attempted to transport any commodity other than those recognized and conceded to be true petroleum products. In previous hearings for classification of commodities, those allowed by the Commission were those found by it to be all hydrocarbons. Appellants received adequate statutory notice and they have shown no prejudice by the "enlargement of the inquiry" before the Commission.

[8] The General Assembly has given the Utilities Commission "full power and authority to administer and enforce the provisions of this chapter, and to make and enforce reasonable and necessary rules and regulations to that end." G.S. 62-31. We cannot agree with appellants' position that the Commission must, in enacting a rule under G.S. 62-31, set forth in its order findings of fact that the rule is reasonable and necessary in order for it to administer and enforce the provisions of the Act. This would be as much an exercise in futility as requiring the Com-

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mission to find as a fact that its order, rule or regulation is not "arbitrary or capricious" or that it is based on "competent, material and substantial evidence in view of the entire record as submitted" as required by G.S. 62-94(b) (5) and (6). Indeed, G.S. 62-94(e) provides that "Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this chapter shall be prima facie just and reasonable."

By their assignment of error No. 3, appellants contend that the Commission committed prejudicial error in admitting the opinion evidence of witnesses who had not been tendered or qualified as experts in violation of G.S. 62-65 and whose testimony had not been reduced to writing and filed with the Commission in advance as was required by its Rule R1-24(g).

Dr. Pelham Wilder, Jr., professor of chemistry at Duke University and professor of pharmacology at Duke University Medical School, testified as to his educational background in the field of chemistry and his experience of over 20 years in the field. He testified he had read the Commission's notice and had studied the list of commodities attached thereto, particularly relative to definitions of petroleum and petroleum products or to the nature of the materials included in the listing. He was then asked to give a definition of a petroleum product. Appellants objected to "his giving us a definition of petroleum products. He may give his determination of what a petroleum product consists of, but not to give a definition of the thing." The following transpired:

"CHAIRMAN WESTCOTT: This will be his definition.

BAILEY: He is not qualified, even if you would tender him as an expert to state that . . .

CHAIRMAN WESTCOTT: That will be the Doctor's definition.

WILLIAMS: Let me rephrase the question.

Q Do you have a definition of petroleum products satisfactory to yourself as a chemist?

OBJECTION: OVERRULED: EXCEPTION NO. 13

A A definition that I would use, my own definition that I would use for petroleum products would be petroleum

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products are defined as those products derived from the main stream of the crude oil and natural gas containing only the elements of carbon and hydrogen and unaltered by the addition of any atom or atoms of other than those of said carbon and hydrogen.

**MOTION TO STRIKE: DENIED: EXCEPTION No. 14."**

G.S. 62-65 provides that "*When acting as a court of record*, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable, . . ." (Emphasis supplied.)

[9] Conceding *arguendo* that in this administrative rule making procedure the Commission was "acting as a court of record," and conceding further *arguendo* that appellants' objection was an objection to Dr. Wilder's qualifications as an expert (rather than to his offering a definition "even if you would tender him as an expert"), the admission of the evidence and denial of the motion to strike constituted the court's ruling on the witness' qualifications as an expert. *Teague v. Power Co.*, 258 N.C. 759, 129 S.E. 2d 507 (1963). And "the absence of a record finding in favor of his qualification is no ground for challenging the ruling of the trial court in allowing him to testify." *Stansbury*, N. C. Evidence 2d, § 133, p. 317.

[10] Nor do we find any merit in the second contention embraced in this assignment of error. N.C.U.C. Rule R1-24(g) (1) and (2) requires that "The proposed initial direct testimony of an expert witness, including accountants, auditors and engineers, *in rate cases and in other proceedings involving detailed and complicated computations, audits, cost studies, appraisals, tables of figures, graphs, charts, drawings, and other exhibits of a similar nature*, shall be reduced to writing . . ." and filed with the Commission at least 60 days prior to the date set for hearing in general rate cases and at least 30 days prior to date set for hearing in all other cases. Appellants do not, of course, contend that this is a rate case. We find no testimony or exhibits of the complexity or nature described in the rule which would require reduction to writing or filing in advance of the hearing. This assignment of error is overruled.

Appellants filed with the Commission a motion for reconsideration and rehearing and excepted to the denial of the mo-

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tion. This is assigned as error and constitutes assignment of error No. 5. The primary reason advanced for reconsideration and rehearing was the assertion that appellants were surprised by the admission of the expert testimony presented by appellees and should be given opportunity to present experts of their own. For reasons already stated in this opinion, this assignment of error is overruled.

Appellants' remaining assignment of error is formal and based on exception to the entry of order of 14 January 1971 amending Group 3 of its Rule R2-37. Conclusions reached in discussing appellants' contentions on appeal compel, of course, the overruling of this assignment of error.

[11] This Court *ex mero motu* ordered additional oral arguments on the question "Was the notice of Rule Making Procedure in Docket No. M-100, Sub 31, given by the Utilities Commission on 25 March 1970, to all intrastate certificated and permitted carriers of petroleum and petroleum products, liquid, in bulk in tank trucks, and interested carriers, notifying them of a proposed amendment to Rule R2-37 and of a hearing thereon at 9:30 a.m. on Wednesday, 29 April 1970, and attaching a copy of the proposed amendment, sufficient notice to carriers, who received that notice but did not participate in the hearing or appeal, of the entry of an order amending the rule in a more restrictive manner than the amendment proposed and attached to the notice of 25 March 1970?" The Commission found that the fact that the certificates of carriers party to this proceeding limit the transportation of petroleum products, other than gasoline, kerosene, fuel oils and naphthas, to originations from certain specified "originating terminals" would render it unlikely that these carriers would ever have the opportunity, under their existing petroleum authority, to transport many of the commodities shown either in Appendix XIII or in Protestants' Exhibit 2 for the reason that such commodities are not shipped from said specified "originating terminals." Having concluded, as we do, that there was sufficient competent, material and substantial evidence to support this finding, we conclude also that it follows, a fortiori, that under the circumstances of this case and as to the carriers who received notice but did not participate, statutory requirements of notice and due process requirements have been met.

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State v. Link

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In light of the conclusions reached, we deem it unnecessary to discuss the contention of the Commission that appellants are not parties aggrieved, have no right to appeal, and if the appeal be treated as a petition for certiorari it should be denied.

Affirmed.

Judges BRITT and PARKER concur.

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STATE OF NORTH CAROLINA v. GLENN FOY LINK

No. 7219SC129

(Filed 23 February 1972)

**1. Hunting § 3— unlawful taking of deer — warrant**

Warrant charging that defendant "did unlawfully and wilfully, and take game animals, to-wit: deer, between the hours of sunset and sunrise, by aid of artificial light, shined more than 50 feet from a public road way" held sufficient to charge an offense punishable under the provisions of G.S. 113-109(b).

**2. Indictment and Warrant § 9— evidentiary matter — inappropriate statute — surplusage**

Where a warrant sufficiently charges the commission of a statutory offense, reference to descriptive matter or evidentiary detail or to an inappropriate section of the statute will be treated as surplusage and will not vitiate the warrant.

**3. Hunting § 3— unlawful taking of deer — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of the offense of taking a deer between sunset and sunrise on a public highway by the use of artificial light.

**4. Hunting § 3; Criminal Law § 114— expression of opinion**

In a prosecution for taking a deer between the hours of sunset and sunrise on a public highway by the use of artificial light, the trial court did not express an opinion that the State had proved the time of commission of the offense by its instruction that as a matter of law "a few minutes after seven o'clock on December 9 is after sunset," the instruction amounting to no more than judicial notice of a physical fact of general knowledge.

**5. Criminal Law § 138; Hunting § 3— unlawful taking of deer — mitigation of punishment prior to conviction**

Where the General Assembly reduced the maximum punishment for the offense of taking deer between sunset and sunrise on a public roadway by the use of artificial light prior to defendant's conviction of that offense upon trial *de novo* in the superior court, and

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the sentence imposed is greater than that allowed by the new law, defendant is entitled to have his sentence reduced to conform with the new law.

APPEAL by defendant from *Collier, Judge*, 7 September 1971 Session of Superior Court held in ROWAN County.

This criminal prosecution was on a warrant issued 15 December 1969, tried *de novo* in the superior court after the defendant appealed from conviction and judgment in the Rowan County Recorder's Court. The complaint portion of the warrant reads as follows:

"C. V. Clark, GP, being duly sworn, complains and says, that at and in said County, and Morgan Township on or about the 9 day of December, 1969, Glen Foy Link did unlawfully, and wilfully, and take game animals, to-wit: deer, between the hours of sunset and sunrise, by aid of artificial light, shinned (sic) more than 50 feet from a public road way, in an area frequented by wild deer. In violation of GS-113-104., Punishable by GS-113-109(B), against the form of the Statute in such cases made and provided, and contrary to law and against the peace and dignity of the State."

The evidence for the State consisted of the testimony of three witnesses: Robert Lee Goodman, Tom Trexler, and Clay Clark. Goodman testified that he lived on Ribelin Road in the eastern part of Rowan County, in an area where there are wild deer. On 9 December 1969, shortly after sunset but before complete darkness, he observed an off-white 1962 Ford automobile with two people in it being driven slowly past his trailer home. (Goodman at this time was standing in his front yard, talking to the State's witness Trexler.) Approximately twenty minutes later, the same vehicle passed again, this time with its headlights on, and stopped on a curve with its headlights shining out into a field. Goodman further testified that he saw a man emerge from the right side of the stopped 1962 Ford and walk around behind the car, and that he then heard a shot—"a high-powered rifle crack." A man then passed in front of the automobile, with its lights shining on him, and got into the right side. When the automobile left, Goodman and Trexler followed in Trexler's automobile and got close enough behind the Ford to read the license number and to recognize the driver as one

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Coolidge Glover. Goodman testified, "I got a good look at the back of the head of the other man in the car. I had seen him before. That man sitting there, the defendant, is the man I saw in that car. I've seen him and I saw him that night. \* \* \* There is not (sic) doubt in my mind that this is the man I saw that night the deer was shot."

On redirect examination, Goodman testified that less than an hour after he had heard the shot, a freshly-killed deer was found in the field into which the lights of the 1962 Ford had been shining, approximately 65 yards from the place where the automobile had been parked.

The witness Trexler testified that on the night in question, he had been at the home of Goodman; that he "had a report on an automobile and . . . went to check on it." He further testified:

"I seen (sic) the car I was looking for twice. It was a 1962 Ford, either cream or a light white. The defendant was in that car. I saw it while I was at Mr. Goodman's house and before. I saw it the first time down at the Creek Road. It was going west, heading to Ribelin Road at the time. It was going slow—he never drives fast. I had an opportunity to observe the passengers in that car. The defendant was one of them. I am familiar with this person. After I saw him on Panther Road, I saw him again traveling north on Ribelin Road, where I was at Mr. Goodman's house. The vehicle was going 25 or 30 miles per hour when it came by where I was. I recognized the vehicle. There were two men in the car. The first time he came by, he came by driving slow and went on and made the circle and came back. He came around the curve and came down and the other curve, like this right here—pulled over to the right of the road and the man gets out on the right side, walks around the car, and lays the gun on the hood, and we hear a shot—or an object that looked like a gun. We heard a shot. I later went back to the scene with the game protector. A dead deer was found."

Clark, an employee of the North Carolina (Wildlife) Resources Commission, testified to the effect that he had later been called to the scene by Goodman and Trexler, and, by shining a light out into the field from the point on the roadside

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where the 1962 Ford allegedly had been stopped, had located the slain deer. He also testified that the deer had been freshly killed by being shot with a rifle.

At the close of the State's evidence, the defendant moved for judgment as of nonsuit, which was denied. The defendant rested and renewed his motion for judgment as of nonsuit, which was also denied. The jury returned a verdict of guilty as charged and the defendant was sentenced to imprisonment for six months. Defendant's motions to set aside the verdict, for judgment notwithstanding the verdict and for a new trial were denied, to which the defendant excepted and gave notice of appeal to the Court of Appeals.

*Attorney General Morgan and Assistant Attorney General Rich for the State.*

*Robert M. Davis for defendant appellant.*

MALLARD, Chief Judge.

The pertinent portions of the North Carolina General Statutes under which the defendant was charged read, at the time he committed the offense, as follows:

"§ 113-104. *Manner of taking game.*—\* \* \* Game birds and game animals shall be taken only in the daytime, between sunrise and sunset . . . . No person shall take any game animals . . . by aid of or with the use of any jacklight, or other artificial light. . . .

(G.S. 113-83 provides that, for the purpose of this article, a deer is a "game animal.")

§ 113-109. *Punishment for violation of article.*—\* \* \*

(b) Any person who *takes or attempts* to take deer between sunset and sunrise with the aid of a spotlight or other artificial light *on any highway* or in any field, woodland, or forest, in violation of this article shall, upon conviction, be fined not less than two hundred fifty dollars (\$250.00) or imprisoned for *not less than ninety days*. \* \* \* " (Emphasis added.)

[1] The defendant's first contention is that the trial judge committed error in denying his motions for judgment as of non-

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suit, on the ground that the warrant upon which he was tried was not sufficient to charge an offense punishable under the provisions of G.S. 113-109(b). We do not agree. The warrant contains an allegation that the acts complained of took place by shining an artificial light from a public roadway. The shooting and killing of a deer with a rifle is a "taking" within the intent and meaning of the statute. The case of *State v. Lassiter*, 9 N.C. App. 255, 175 S.E. 2d 689 (1970), cited by appellant, is distinguishable.

[2] Where the warrant, as in this case, sufficiently charges the commission of a statutory offense, reference to descriptive matter or evidentiary detail are treated as surplusage, or reference to an inappropriate section of the statute will not vitiate the warrant. 4 Strong, Indictment and Warrant, § 9, pp. 352 and 353; *State v. Abernathy*, 265 N.C. 724, 145 S.E. 2d 2 (1965); *State v. Anderson*, 259 N.C. 499, 130 S.E. 2d 857 (1963).

[3] We hold that the warrant in the case before us sufficiently charged a violation of Article 7 of Chapter 113 of the General Statutes, punishable as set out in G.S. 113-109(b), and that the defendant was properly tried for taking a deer between sunset and sunrise, on a public roadway, by the use of artificial light. *State v. Anderson, supra*; *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). The State's evidence was ample to withstand the motion for judgment as of nonsuit; therefore, it was not error for the trial judge to allow the case to proceed to judgment. In view of the foregoing holding, the defendant's contention that the trial court erred in referring to portions of G.S. 113-109(b) in its charge to the jury is without merit and requires no discussion.

[4] The defendant also assigns as error the following portion of the charge to the jury:

"I instruct you as a matter of law that a few minutes after seven o'clock on December 9 is after sunset . . . ."

The defendant contends that this statement was a violation of G.S. 1-180, which prohibits the judge from giving an opinion as to whether a fact has been sufficiently proven. This contention is without merit. The State had presented evidence that the offense had been committed shortly after 7:00 p.m. on 9 December 1969. We do not perceive that Judge Collier expressed any

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opinion whatsoever that the State had proved the time of the commission of the offense in the statement complained of. His instruction amounted to no more than judicial notice of a physical fact of general knowledge, and was proper. Counsel for the defendant has failed to distinguish between the *allegation* that the shooting of the deer occurred shortly after 7:00 p.m. on the date in question (which it was incumbent upon the State to prove) and the *fact* that shortly after 7:00 p.m. on the date in question was after sunset (which was a proper subject for judicial notice).

In *Weavil v. Myers*, 243 N.C. 386, 90 S.E. 2d 733 (1956), it was said, "We take judicial notice of the fact that about 7:00 p.m. on 26 November 1954, in North Carolina, was within the time between one-half hour after sunset and one-half hour before sunrise." See also, *Oxendine v. Lowry*, 260 N.C. 709, 133 S.E. 2d 687 (1963).

The defendant contends that the trial judge committed error in other portions of the charge. When the charge is read and considered as a whole, no prejudicial error is made to appear.

[5] The offense charged, however, was alleged to have been committed on 9 December 1969. The punishment authorized at that time by G.S. 113-109(b) was a fine of *not less than* \$250.00 or imprisonment for *not less than* ninety days. Upon his conviction in superior court at the 7 September 1971 Session, the defendant was sentenced to a term of imprisonment for six months. Before his conviction and sentence in the superior court, the Legislature had reduced, effective 8 June 1971, the punishment for the offense of which the defendant was convicted. See G.S. 113-109(b) as amended in 1971. This reduction inured to the benefit of the defendant. *State v. Pardon*, 272 N.C. 72, 157 S.E. 2d 698 (1967); *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970); and *State v. Jack Arnold McIntyre*, 13 N.C. App. 479 (1972). The sentence imposed in the case before us was greater than that allowed by law at the time of its imposition; therefore, the judgment imposing the sentence of six months is vacated, and the cause is remanded for proper judgment under the provisions of G.S. 113-109(b), as amended by the 1971 General Assembly. *State v. Darnell*, 266 N.C. 640, 146 S.E. 2d 800 (1966); *State v. Seymour*, 265 N.C. 216, 143 S.E. 2d 69 (1965); *State v. Alston*, 264 N.C. 398, 141 S.E. 2d 793

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(1965); *State v. Templeton*, 237 N.C. 440, 75 S.E. 2d 243 (1953).

Remanded for the entry of a proper judgment.

Judges MORRIS and PARKER concur.

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JOSEPH L. LOFLIN, EMPLOYEE, PLAINTIFF V. JAMES C. LOFLIN,  
BUILDER, EMPLOYER; NATIONWIDE MUTUAL INSURANCE COM-  
PANY, CARRIER, DEFENDANTS

No. 7219IC159

(Filed 23 February 1972)

**1. Master and Servant § 69— workmen's compensation — "disability"**

In order to obtain compensation under the Workmen's Compensation Act, an employee must establish that his injury caused his "disability" — i.e., impairment of wage-earning capacity — unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power.

**2. Master and Servant § 65— workmen's compensation — permanent partial disability of back — incapacity to work**

Although there was evidence that, because of an injury to his back, plaintiff is totally unable to perform the essential duties of a carpenter, his occupation prior to being injured, the Industrial Commission properly awarded plaintiff compensation for a 50% permanent partial disability to his back, not for total incapacity, since the disability deemed to continue after the healing period of an injury causing partial loss of use of the back is compensable under the provisions of G.S. 97-31(23) without regard to the loss of wage-earning power and in lieu of all other compensation.

**3. Master and Servant § 65— workmen's compensation — temporary total disability**

Plaintiff's contention that he is still temporarily totally disabled from a back injury is not supported by the evidence or the findings of the Industrial Commission.

APPEAL by plaintiff from an Order and Award of the North Carolina Industrial Commission filed 5 August 1971.

In this case instituted under the provisions of the North Carolina Workmen's Compensation Act (Act), it was stipulated, among other things, that plaintiff was injured on 16 May 1967 by accident arising out of and in the course of his employment

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with defendant Loflin (Employer), and that he had an average weekly wage of \$100.00. Thereafter an agreement was entered into by the parties whereby liability was admitted by the Employer and the plaintiff received temporary total disability compensation "from 5-16-67 to 10-14-68, and again from 10-14-68 to 3-10-69."

Plaintiff's evidence tended to show that he was a skilled carpenter and that his back was injured when a scaffold on which he was working broke and he fell to the ground from a height of 18 to 20 feet. After the fall he was found to have a fracture of his twelfth dorsal vertebra, and since this fall has had urinary troubles, pain in his back and has not worked.

Plaintiff's witness Dr. Everett O. Jeffreys testified:

"I have a medical opinion satisfactory to myself in regard to the disability of Joseph L. Loflin. That opinion is I think that he's disabled from any active work that requires stooping or lifting, that he uses motion in his mid and lower back, and I think that this is due to the old compression fracture of the vertebra T 12 and L 1 with narrowing of the foramina and that he has some nerve root compression that acts both as paralytic or paretic type of manifestation and also in irritability . . . I think that he is disabled from doing any active muscular work that requires stooping or lifting. I think he is totally disabled from that and permanently disabled from it."

Dr. Jeffreys testified on cross-examination that plaintiff, as a result of his fall in May 1967, sustained an eighty percent permanent partial disability of his back, and that he had reached the point of maximum recovery from his injury within a year of the time of the accident. He also testified that the urinary difficulties experienced by plaintiff were directly traceable to the injury.

Plaintiff's witness Dr. Hugh Fitzpatrick testified that he saw plaintiff in May 1967 in the emergency room of the hospital where plaintiff had been brought after receiving the injury, and that he had a "compression fracture of the twelfth thoracic, twelfth vertebra" at that time. Dr. Fitzpatrick saw the plaintiff a number of times thereafter. He testified that plaintiff reached maximum improvement in April 1968, and had about a thirty-five percent permanent disability of the back.

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Defendant's witness Dr. John F. Register testified that he had examined plaintiff in June 1968, at which time plaintiff had reached maximum improvement and had a thirty-five percent permanent partial disability of the back. He further testified he found nothing traceable to the injury that would have caused plaintiff any interruption or trouble insofar as urination was concerned.

There was a stipulation as to what Dr. George Johnson would testify if he were called as a witness but there was no provision that such could be considered as evidence in the case.

On 29 December 1970 Commissioner Stephenson filed an opinion and award in which he set out the stipulations of the parties and made findings of fact, including finding of fact no. 6 as follows:

"6. Plaintiff reached maximum improvement from his accident on June 3, 1968. He has sustained a 50% permanent partial disability to his back by reason of the injury by accident giving rise to this claim. Plaintiff's urinary symptoms are not due to the injury by accident giving rise to this claim. Further medical treatment will not lessen plaintiff's period of disability."

Based on the findings of fact, Commissioner Stephenson made the following conclusions of law:

"1. Plaintiff has sustained a 50% permanent partial disability to his back by reason of the injury by accident giving rise to this claim and he is entitled to compensation for same as by law provided. GS 97-31(23).

2. Defendants are entitled to credit on the permanent partial disability award for all payments made to plaintiff from and after June 3, 1968, the date maximum improvement was reached. GS 97-44."

On the findings of fact and conclusions of law, the Commissioner made the following award:

"1. Defendants shall pay plaintiff compensation at the rate of \$37.50 per week for 150 weeks beginning June 3, 1968, for a 50% permanent partial disability to the back. Defendants shall take credit on said payments for all compensation paid to plaintiff from and after June 3, 1968."

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In addition, the Commissioner ordered defendants to pay costs and proper medical expenses of plaintiff, and also approved an amount for plaintiff's attorney's fee.

Plaintiff appealed. The full Commission amended Commissioner Stephenson's findings of fact nos. 3 and 6. Finding of fact no. 3 was amended by deleting certain portions thereof and finding of fact no. 6 was amended by adding thereto the following:

"Plaintiff is not temporarily totally disabled as a result of the injury by accident giving rise to this claim."

The full Commission adopted as its own the opinion and award, as amended, of Commissioner Stephenson, and from this opinion and award, the plaintiff appealed to the Court of Appeals.

*John Randolph Ingram for plaintiff appellant.*

*I. Weisner Farmer for defendant appellees.*

MALLARD, Chief Judge.

[1] "To obtain an award of compensation for an injury under the North Carolina Workmen's Compensation Act, an employee must always show these three things: (1) That he suffered a personal injury by accident; (2) that his injury arose in the course of his employment; and (3) that his injury arose out of his employment. *Withers v. Black*, 230 N.C. 428, 53 S.E. 2d 668. Furthermore, he must establish a fourth essential element, to wit, that his injury caused him disability, *unless it is included in the schedule of injuries made compensable by G.S. 97-31 without regard to loss of wage-earning power. Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865. (Emphasis added.) As used here, the term 'disability' signifies an impairment of wage-earning capacity rather than a physical impairment." *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). *Anderson* was decided in 1951. In 1955 the General Assembly, by Section 7 of Chapter 1026 of the Session Laws, enacted what is now G.S. 97-31(23). The portions of G.S. 97-31 pertinent to this appeal read as follows:

"In cases included by the following schedule the compensation in each case shall be paid for *disability* during the

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*healing period and in addition the disability shall be deemed to continue for the periods specified, and shall be in lieu of all other compensation, including disfigurement, to wit:*

\* \* \*

(23) For the total loss of use of the back, sixty per centum (60%) of the average weekly wages during 300 weeks. The compensation for *partial loss of use of the back* shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is seventy-five per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered 'total industrial disability' and compensated as for total loss of use of the back." (Emphasis added.)

[2, 3] The plaintiff contends that all of the evidence shows that, due to the injury to his back, he is totally unable to perform the essential duties of a carpenter, his occupation prior to his injury, and that the North Carolina Industrial Commission (Commission) committed error in failing to so find. The Commission made factual findings, supported by competent evidence, on all of the crucial issues before it. Under these findings, the disability deemed to continue after the healing period of plaintiff's injuries is made compensable under the provisions of G.S. 97-31(23) without regard to the loss of wage-earning power and in lieu of all other compensation. See, *Dudley v. Downtowner Motor Inn*, 13 N.C. App. 474, 186 S.E. 2d 188 (1972). The General Assembly, when it enacted G.S. 97-31 and, in 1955, made it applicable to the partial loss of use of the back, provided that compensation payable thereunder was "in lieu of all other compensation." "The language of G.S. 97-31 is clear, and its provisions are mandatory." *Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764 (1956). The fact that an injury is one of those enumerated in the schedule of payments set forth under G.S. 97-31 precludes the Commission from awarding compensation under any other provision of the Act. *Watts v. Brewer, supra*. Under the provisions of G.S. 97-31, plaintiff was entitled to, and did receive compensation for disability from his injuries during the healing period. Plaintiff's contention that he is still temporarily totally disabled is not supported by the evidence or the findings of the Commission. "Where a claimant suffers an injury that results in temporary total disability followed by a

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specific disability compensable under G.S. 97-31, compensation for the specific disability is payable in addition to that awarded for temporary total disability." *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971).

It was found by the Commission upon competent evidence that plaintiff had reached maximum improvement on 3 June 1968 and that further treatment would not lessen his period of disability. The healing period was over. Thereafter, plaintiff was entitled to receive compensation only as provided in G.S. 97-31(23), and such compensation was properly awarded by the Commission.

We have examined plaintiff's other exceptions and no prejudicial error is made to appear. The case of *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968), cited and relied on by plaintiff, is distinguishable. In *Morgan*, the question was raised but no finding was made concerning the mental, emotional, and psychological incapacity of the claimant resulting from an injury. The case was remanded to the Commission with instructions "to make findings of fact determinative of all questions at issue and proceed as the law requires." In the case before us, there have been findings supported by competent evidence with respect to all crucial facts.

The opinion and award appealed from is

Affirmed.

Judges MORRIS and PARKER concur.

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JERRY W. GOBLE v. V. LEE BOUNDS, DIRECTOR OF NORTH CAROLINA  
DEPARTMENT OF CORRECTION

No. 7217SC34

(Filed 23 February 1972)

**1. Convicts and Prisoners § 2— prison records — confidential**

Prison records are confidential and are not subject to inspection by the public or by the inmate involved. G.S. 148-74; G.S. 148-76.

**2. Convicts and Prisoners § 2— prison records — inspection by inmate**

A prison inmate's constitutional rights are not violated by refusal of the Department of Correction to allow him to examine the contents

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of his prison file and to offer commentary on items which may adversely affect his opportunities for honor grade status, work release or parole.

**3. Convicts and Prisoners § 2— honor grade — discretion of Department of Correction**

The award of "honor grade status" to a prison inmate is a discretionary act of the State Department of Correction, and its decisions relating to such awards are not subject to procedural due process.

**4. Criminal Law § 138; Convicts and Prisoners § 2— work release — discretion of court and Board of Paroles**

Decisions of the trial court and the State Board of Paroles relating to the "work release privilege" are discretionary acts and are not subject to procedural due process.

APPEAL by plaintiff from an Order entered by *Long, Judge*, 14 July 1971, following a hearing in chambers by consent.

Jerry W. Goble, the plaintiff-appellant in this case, is a North Carolina resident and is incarcerated in the Blanch Prison unit in Caswell County, North Carolina. In his complaint, plaintiff alleges that his personal prison record contains a letter from Douglas Albright, Solicitor of the Twelfth Solicitorial District, who represented the State in plaintiff's criminal trial. It is further alleged that the said letter contains allegations which are derogatory of plaintiff and are highly damaging to his reputation; that the allegations must be false and plaintiff desires the opportunity to know the contents of said letter and desires to explain, deny, and rebut all parts of said letter which he might find to be inaccurate; that the allegations made in said letter have adversely affected his opportunities for earning honor grade status, work release, or parole. The complaint further states that the defendant, V. Lee Bounds, Director of North Carolina Department of Correction, and his agents and servants have failed and refused to permit the plaintiff the opportunity to review this letter, consider its accuracy and offer any commentary on the letter that he might desire; that the defendant consistently denies prisoners the right to examine the contents of their personal files maintained by the North Carolina Department of Correction; that the general practice of defendant and the specific denial by defendant to plaintiff of the right to review the letter is arbitrary, irrational, and capricious conduct by defendant, which has the effect of depriving plaintiff of rights, privileges, and immunities secured by the North Carolina

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Constitution and the Constitution of the United States. The plaintiff requested that the complaint be treated as an affidavit and motion in support of injunctive relief.

Defendant moved to dismiss the complaint on the grounds that it had failed to state a claim upon which relief could be granted. Judge Long granted defendant's motion to dismiss and plaintiff appealed.

*Smith and Patterson, by Norman B. Smith and Michael K. Curtis, for plaintiff.*

*Attorney General Robert Morgan, by Assistant Attorney General Jacob L. Safron, for defendant.*

BROCK, Judge.

Plaintiff-appellant brings forward one assignment of error based on four exceptions to the Judgment of Judge Long filed 14 July 1971. The plaintiff's assignment of error is that the Superior Court committed reversible error in ordering the dismissal of plaintiff's action for an injunction. We do not agree.

[1] The plaintiff's first exception was addressed to the Court's conclusion and finding "... that prison records of inmates are confidential and are not subject to inspection by the public nor the inmate concerned; and that the Plaintiff's allegations fail to allege a violation of his rights." As we construe G.S. 148-74 and G.S. 148-76 the trial court was correct. G.S. 148-74 states the administration of the Records Section is under the control and direction of the Director of Probation, the Commissioner of Correction, and the chairman of the Board of Paroles, and G.S. 148-76 states the information collected shall be made available to law-enforcement agencies, courts, correctional agencies, or other officials requiring criminal identification, crime statistics, and other information respecting crimes and criminals. These records are confidential and only named parties have access to them.

[2] Plaintiff further contends that defendant's denial to plaintiff of the right to examine the contents of his personal prison file and to offer commentary on the contents of the file is arbitrary, irrational, and capricious conduct, which has the effect of depriving plaintiff of rights, privileges, and immunities secured by the Federal and North Carolina Constitutions. We

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agree with the trial court in its conclusion "... that the plaintiff, upon being considered for honor grade status or work release, is not entitled, either under the State or Federal Constitutions, to procedural due process rights . . . ."

[3] G.S. 148-13 provides that the rules and regulations for the government of the State prison system may contain provisions relating to grades of prisoners, rewards and privileges applicable to the several classifications of inmates as an inducement to good conduct. In reference to G.S. 148-13, our court has stated that the prison rules and regulations respecting rewards and privileges for good conduct are strictly administrative and not judicial. The giving or withholding of the rewards and privileges under these rules promulgated by the State Department of Correction is not a matter with which the courts are authorized to deal. *State v. McCall*, 273 N.C. 135, 159 S.E. 2d 316 (1968); *State v. Garris*, 265 N.C. 711, 144 S.E. 2d 901 (1965). In other words, the award of "honor grade status" is a discretionary act of the State Department of Correction, and its decisions relating to such awards are not subject to procedural due process.

G.S. 148-33.1 provides for the "work release privilege" to eligible prison inmates. G.S. 148-33.1(a) states "(w)henever a person is sentenced to imprisonment for a term not exceeding five years to be served in the State prison system, the presiding judge of the sentencing court may recommend to the State Department of Correction that the prisoner be granted the option of serving the sentence under the work release plan . . . ." Clearly, G.S. 148-33.1 authorizes but does not require the presiding judge of the sentencing court to recommend that the prisoner be granted the privilege of the Work Release Program. The granting of the privilege is within the discretion of the trial judge. *State v. Wright*, 272 N.C. 264, 158 S.E. 2d 50 (1967).

G.S. 148-33.1(b) authorizes but does not require the Board of Paroles of this State to authorize the State Department of Correction to grant work release privileges to any inmate of the State prison system provided that the stated conditions in the statute are met.

[4] We hold that the decisions of the trial court and the State Board of Paroles relating to the "work release privilege" are discretionary acts and are not subject to procedural due process.

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We conclude that honor grade status, work release privilege, and parole are discretionary acts of grace or clemency extended by the State as a reward for good behavior, conferring no vested rights upon the convicted person. In our judicial system, an accused person must be given full constitutional protection before and during his trial, but procedures of constitutional dimension are not appropriate in subsequent determinations of rewards for good behavior while serving a validly imposed sentence of confinement. The purpose of our correctional institution is to aid the convicted person and to rehabilitate him; therefore, we reject plaintiff's contentions which would create meaningless technicalities and, thus, impair and hinder the purpose of our correctional system when no substantive rights are involved.

Affirmed.

Judges BRITT and VAUGHN concur.

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STATE OF NORTH CAROLINA v. JAMES WESLEY SMITH,  
DEFENDANT

No. 7221SC70

(Filed 23 February 1972)

**1. Criminal Law § 101; Trial § 13—unauthorized view of crime scene by juror**

The fact that a juror, without leave of the court, visits the premises where the offense is alleged to have been committed is not ground for a new trial unless it is made to appear that some prejudice resulted to defendant.

**2. Criminal Law § 101; Trial § 13—jury view**

The trial judge has discretionary power to grant or refuse a request for a jury view of the premises or an object involved in a case.

**3. Criminal Law § 101; Trial § 13—jury view of arrest scene**

The trial judge was acting within his discretion in ordering a jury view of the scene of defendant's arrest for possession of marijuana after one juror had made an unauthorized visit to the premises, especially since confusing descriptions of the scene were given in testimony by witnesses for both sides.

**4. Criminal Law § 101; Trial § 13—jury view—illustrative purpose—instructions**

The trial court did not err in failing to instruct the jury that evidence which they obtained by viewing the scene of defendant's

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arrest should be considered as illustrative evidence, where defendant made no request that the evidence obtained by the jury view be admitted for a limited purpose or that the jury be given special instructions with respect thereto.

5. Criminal Law § 101; Trial § 13—jury view—alleged irregularities

The record does not support defendant's contention that there were various irregularities in the manner in which a jury view was conducted.

6. Criminal Law §§ 102, 170—failure of defendant to present witnesses—comment by solicitor

Any prejudice in the solicitor's comment upon defendant's failure to bring in as witnesses eight persons who were present at the time of his arrest was nullified when the court instructed the jury that defendant was not under any burden to present any witnesses and that his failure to bring any witnesses should not be considered against him.

7. Narcotics § 5; Criminal Law § 138—possession of marijuana—reduction of punishment by legislature

Where, pending defendant's appeal from a sentence of three years imposed upon his conviction of the felony of possession of more than one gram of marijuana, the General Assembly reduced the grade of a first conviction for that offense to a misdemeanor punishable by imprisonment for not more than six months, defendant is entitled to have his sentence reduced to six months.

APPEAL by defendant from *Cowper, Judge*, 26 July 1971 Criminal Session of Superior Court held in FORSYTH County.

Defendant appeals from a judgment of imprisonment for a term of three years imposed upon a jury verdict finding him guilty of the possession of more than one gram of marijuana.

*Attorney General Morgan by Associate Attorney General Conley for the State.*

*Westmoreland, Sawyer & Schoonmaker by Barbara C. Westmoreland for defendant appellant.*

GRAHAM, Judge.

Defendant contends he is entitled to a new trial because one of the jurors went to the scene of defendant's arrest without authorization during the course of the trial, and also because the court later permitted all of the jurors to view the scene over defendant's objection.

The record reflects that when court was opened on the second day of trial the following transpired:

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"COURT: It appearing that one of the jurors made it known to the deputy sheriff that he went to the location of Vine Street where the defendant was arrested for the purpose of viewing the premises. The Court talked to this juror and he stated that he has no opinion about the matter that he was curious to see the location and that he had not made up his mind with regard to guilt or innocence of the defendant and that this had no effect upon him. Upon making this known to the defendant's attorney, motion was made for mistrial. The Court, in its discretion, denies the motion upon the ground that no prejudice to the defendant has been shown or indicated and the Court, at this time, has ordered that all twelve jurors be taken to the scene on Vine Street and be permitted to view the premises.

The defendant objects and excepts.

DEFENDANT'S EXCEPTION #3."

[1] The fact that a juror, without leave of the court, visits the premises where the offense is alleged to have been committed is not grounds for a new trial, unless it is made to appear that some prejudice resulted to defendant. Annot., 58 A.L.R., 2d 1147 and cases cited. Also see *State v. Boggan*, 133 N.C. 761, 46 S.E. 111; *S. v. Perry*, 121 N.C. 533, 27 S.E. 997; *State v. Tilghman*, 33 N.C. 513. Defendant made no effort to show prejudice and the court found that none had been shown.

[2] It is settled in most jurisdictions, including this one, that the trial judge has discretionary power to grant or refuse a request for a jury view of the premises or an object involved in a case. *State v. Ross*, 273 N.C. 498, 160 S.E. 2d 465; *Paris v. Aggregates, Inc.*, 271 N.C. 471, 157 S.E. 2d 131; *Toler v. Brink's, Inc.*, 1 N.C. App. 315, 161 S.E. 2d 208.

[3] Here, neither the State nor defendant requested a jury view. The trial judge ordered the jury view upon his own motion, presumably because one juror had already made an unauthorized visit to the premises. We hold that in doing so, the trial judge was acting within his sound discretion. There are cases in other jurisdictions which suggest that one way to remove possible prejudice resulting from an unauthorized view by a juror is to permit the entire panel to view the premises and thereby obtain the same information. *People v. Kudla*, 223 Mich. 137, 193

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N.W. 844; *Bird v. State*, 22 Okla. Crim. 263, 210 P. 925; *State v. Carlson*, 144 Wash. 311, 258 P. 12.

Moreover, it appears that in the present case a jury view of the place where defendant was arrested should have enabled the jury to better understand the rather confusing descriptions of the scene given in testimony by witnesses for both sides. The State's evidence tended to show that defendant and eight others were arrested for gambling. They were lined up to be searched with their hands against a wall. The State contended that before defendant was searched, he removed some packets of marijuana from his pocket and placed them over or on top of the wall. Defendant contended that he did not. The wall was located adjacent to the alley where the arrest occurred and apparently served as a retainer for a parking lot extending from the top of the wall. A chain link fence extended along the top of the wall, separating the parking lot from the alley or court below. Recollections of the arresting officers differed as to whether the marijuana was recovered by getting a step ladder and reaching up from in front of the wall or by going around the wall. Testimony conflicted as to the height of the wall, the description of the chain link fence, and as to other features at the scene.

[4] Defendant assigns as error the court's failure to instruct the jury that the evidence which they obtained by viewing the scene was to be considered only as illustrative evidence. It is true that a jury view is to be used with the same effect as pictures, maps, drawings and other illustrative sources. *Toler v. Brink's, Inc.*, *supra*. However, in the absence of a timely request, failure of the court to instruct the jury that evidence may be considered only for a limited purpose is not error. *State v. Casper*, 256 N.C. 99, 122 S.E. 2d 805. When only a general objection is interposed and overruled it will not be considered as reversible error if the evidence is competent for any purpose. *State v. Walker*, 6 N.C. App. 447, 170 S.E. 2d 627. Defendant made no request that the evidence obtained by the jury view be admitted for a limited purpose or that the jury be given special instructions with respect thereto. This assignment of error is therefore overruled.

[5] Defendant asserts that there were various irregularities with respect to the manner in which the jury view was conducted. It does not appear to us that any of these questions arise on this record. "After all, there is a presumption of regularity in

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the trial. In order to overcome that presumption it is necessary for matters constituting material and reversible error to be made to appear in the case on appeal." *State v. Sanders*, 280 N.C. 67, 72, 185 S.E. 2d 137, 140.

[6] Defendant's final assignment of error encompasses an exception set forth in the record as follows:

"'COURT: The Solicitor, in his argument to the jury, commented upon the fact that the defendant failed to bring in as witnesses 8 other persons who were present at the time of his arrest and who might have testified in his behalf.'

DEFENDANT'S EXCEPTION #6."

It does not appear that defendant objected to this argument at the time it was made and in charging the jury, the court instructed: "Nor is he under any burden to bring any witness here for you to hear unless he elects to do so and the fact that he does not bring any witnesses should not be considered against him or held against him by you for his failure to do so because he is presumed to be innocent." Even if it be conceded that the portion of the solicitor's argument excepted to was improper, the court's charge nullified any prejudicial effect.

[7] While this case was on appeal to this Court, the Act of the 1971 General Assembly, entitled "North Carolina Controlled Substances Act," became effective. This new Act replaced the former "Narcotic Drug Act" under which possession of marijuana in excess of one gram was a felony punishable by a fine of not more than \$1,000.00 or imprisonment for not more than five years. G.S. 90-111(a). Under the new Act, a first offense of possession of any quantity of marijuana is punishable by imprisonment for a term of not more than six months or a fine of not more than \$500.00. G.S. 90-95(e). The new Act provides that prosecutions for any violation of law occurring prior to 1 January 1972 "shall not be affected by these repealers, or amendments, or abated by reason, thereof." G.S. 90-113.7(a). No reference is made to the punishment to be imposed, and the offense for which defendant was convicted is reduced in the new Act from the grade of felony to that of misdemeanor and the maximum imprisonment which may be imposed is reduced to six months. This reduction inures to the benefit of defendant. *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765; *State v.*

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*Pardon*, 272 N.C. 72, 157 S.E. 2d 698; *State v. McIntyre*, 13 N.C. App. 479, 186 S.E. 2d 207 (1972), and *State v. Kelly* (filed in this Court the same date of this opinion). "A judgment is not final as long as the case is pending on appeal." *State v. Pardon*, *supra* at 75, 157 S.E. 2d at 701.

In view of the reduction in the maximum punishment allowed for the offense for which defendant was convicted, the judgment in this case is modified so as to reflect the grade of offense as that of misdemeanor and to reduce the sentence of imprisonment imposed to imprisonment for six months.

Modified and affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. HUGH McDONALD KELLY

No. 715SC493

(Filed 23 February 1972)

**1. Narcotics § 2—unlawful possession of hypodermic syringe and needle — indictment**

A bill of indictment drafted substantially in the language of [former] G.S. 90-108 was sufficient to charge the offense of unlawful possession of a hypodermic syringe and needle for the purpose of administering habit-forming drugs.

**2. Indictment and Warrant § 9— allegation of two offenses alternatively**

Two or more offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count.

**3. Indictment and Warrant § 9— alternative means of committing crime — use of "or" in indictment**

When a statute specifies several means or ways in which an offense may be committed in the alternative, the indictment should not allege such means or ways in the alternative; the proper way is to connect the various allegations in the indictment with the conjunctive term "and" and not with the word "or."

**4. Indictment and Warrant § 9—improper use of disjunctive — fatal defect**

Whether the improper use of the disjunctive constitutes a fatal defect in an indictment depends upon whether such use renders the indictment uncertain.

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**5. Indictment and Warrant § 9; Narcotics § 2—possession of “hypodermic syringe or needle”—allegation in indictment**

An allegation in the disjunctive that defendant possessed a “hypodermic syringe or needle” did not render the indictment fatally defective for uncertainty, since the statute under which defendant was charged, [former] G.S. 90-108, sets forth only one offense—that is, the unlawful possession of an instrument adapted for the use of habit-forming drugs.

**6. Indictment and Warrant § 8—waiver of duplicity**

Defendant waived any duplicity that might have existed in the indictment by going to trial without making a motion to quash.

**7. Criminal Law § 138; Narcotics § 5—unlawful possession of hypodermic needle—reduction of punishment by legislature**

Where, pending defendant’s appeal from a sentence of not less than two nor more than three years imposed upon his conviction of the felony of unlawful possession of a hypodermic syringe and needle for the purpose of administering habit-forming drugs, the General Assembly reduced that offense to the grade of a general misdemeanor, defendant is entitled to have the maximum period of his sentence reduced to two years imprisonment. G.S. 90-113.4(b).

APPEAL by defendant from *Fountain, Judge*, 1 March 1971 Session of Superior Court held in NEW HANOVER County.

Defendant was brought to trial on a bill of indictment charging the following:

“That Hugh McDonald Kelly late of the County of New Hanover on the 29th day of January 1971 with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously have in his possession a hypodermic syringe or needle for the purpose of administering habit-forming drugs, and he, the said Hugh McDonald Kelly, did not have a valid certificate of a physician issued within the preceding year authorizing such possession, against the form of the statute in such case made and provided and against the peace and dignity of the State.”

The jury returned a verdict finding defendant “guilty of the offense of possession of Hypodermic needle & syringe.”

Judgment was entered imposing a prison sentence for a term of not less than two nor more than three years. Defendant filed a written motion in arrest of judgment asserting that the bill of indictment was insufficient. The motion was denied and defendant excepted and appealed.

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*Attorney General Morgan by Associate Attorney Poole for the State.*

*H. P. Laing for defendant appellant.*

GRAHAM, Judge.

The evidence and the charge are not included in the record and the only question defendant raises in his brief is whether the court erred in denying his motion in arrest of judgment. This presents for review the question of whether the bill of indictment is fatally defective. We hold that it is not.

The indictment is based on G.S. 90-108 which provided, at the time of defendant's arrest and trial, the following:

"No person except a manufacturer of a wholesaler or a retail dealer in surgical instruments, pharmacist, physician, dentist, veterinarian, nurse or interne shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit-forming drugs by subcutaneous injections and which is possessed for the purpose of administering habit-forming drugs, unless such possession be authorized by the certificate of a physician issued within the period of one year prior thereto."

The bill of indictment is drafted substantially in the language of the statute. "A warrant or indictment following substantially the language of the statute is sufficient if and when it thereby charges the essentials of the offense 'in a plain, intelligible, and explicit manner.' G.S. 15-153; *State v. Eason*, 242 N.C. 59, 86 S.E. 2d 774. If the statutory words fail to do this they 'must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged.' *State v. Cox*, 244 N.C. 57, 60, 92 S.E. 2d 413, 415 and cases cited." *State v. McBane*, 276 N.C. 60, 65, 170 S.E. 2d 913, 916.

[1] The language of the statute here involved plainly sets forth all of the essentials of the offense. In our opinion no supplementary allegations are needed in order to place defendant on notice as to the offense charged, enable the court to proceed to judgment, or bar a subsequent prosecution.

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[2, 3] Defendant's principal complaint about the indictment is that it charges in the disjunctive or alternative by alleging "hypodermic syringe or needle," rather than in the conjunctive by the use of the word "and." Two or more offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count. *State v. Helms*, 247 N.C. 740, 102 S.E. 2d 241. Moreover, it is always the better practice to use the conjunctive "and" rather than the disjunctive "or" where a statute sets forth disjunctively several means or ways by which an offense may be committed. "'As a general rule, where a statute specifies several means or ways in which an offense may be committed in the alternative, it is bad pleading to allege such means or ways in the alternative; the proper way is to connect the various allegations in the accusing pleading with the conjunctive term 'and' not with the word 'or'.'" *State v. Helms*, *supra* at 742, 102 S.E. 2d at 243. See also: *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399; *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535; *State v. Chestnutt*, 241 N.C. 401, 85 S.E. 2d 297.

[4] Whether the improper use of the disjunctive constitutes a fatal defect in an indictment, or simply "poor pleading," depends upon whether such use renders the indictment uncertain. "The indictment should not charge a party disjunctively or alternatively, in such a manner as to leave it uncertain what is relied on as the accusation against him," *State v. Swaney*, *supra* at 612, 178 S.E. 2d at 405. "[T]he better rule seems now to be that 'or' is only fatal when the use of it renders the statement of the offense uncertain. . . ." *State v. Van Doran*, 109 N.C. 864, 865, 14 S.E. 32, 32.

[5] The statute under which defendant was charged sets forth only one offense; that is, the unlawful possession of an instrument adapted for the use of habit-forming drugs. The offense is proven when it is shown that a defendant had within his possession, under circumstances described in the statute, one or more hypodermic syringes, needles, or other instruments or implements adapted for the use of habit-forming drugs, or any combination thereof. The fact the indictment here charges hypodermic syringe or needle creates no uncertainty as to the offense. Apparently the indictment was treated as charging the possession of both hypodermic needle and syringe for the jury verdict found defendant guilty of possessing both.

[6] We further note that by going to trial without making a motion to quash, defendant waived any duplicity that *might*

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have existed in the bill of indictment. The case of *State v. Merritt*, 244 N.C. 687, 94 S.E. 2d 825, is in point. There, Justice Rodman, speaking for the court stated:

“Defendant moves this Court to quash the bill of indictment and in arrest of judgment. The bill follows the language of the statute and charges the operation of a motor vehicle ‘while under the influence of intoxicating liquor, opiates or narcotic drugs.’ The defendant insists that the use of the disjunctive ‘or’ instead of the conjunctive ‘and’ which might have been used renders his conviction void for uncertainty. Had the bill used the conjunctive word, no question could have been raised as to the sufficiency of the bill. The defendant could have required separate counts, one charging operation of a motor vehicle while under the influence of intoxicating liquor, the other charging the operation while under the influence of narcotics. By going to trial without making a motion to quash, he waived any duplicity which might exist in the bill. *S. v. Smith*, 240 N.C. 99, 81 S.E. 2d 263; *S. v. Puckett*, 211 N.C. 66, 189 S.E. 183; *S. v. Burnett*, 142 N.C. 577; *S. v. Hart*, 116 N.C. 976; *S. v. Mundy*, 182 N.C. 907, 110 S.E. 93; *S. v. Beal*, 199 N.C. 278, 154 S.E. 604.”

In accord: *State v. Green*, 266 N.C. 785, 147 S.E. 2d 377; *State v. Strouth*, 266 N.C. 340, 145 S.E. 2d 852; *State v. Anderson* and *State v. Brown*, 265 N.C. 548, 144 S.E. 2d 581; *State v. Best*, 265 N.C. 477, 144 S.E. 2d 416; *State v. Thompson*, 257 N.C. 452, 126 S.E. 2d 58; *State v. Turner*, 8 N.C. App. 541, 174 S.E. 2d 863; *Blakeney v. State*, 2 N.C. App. 312, 163 S.E. 2d 69.

[7] While this case was on appeal to this Court, the Act of the 1971 General Assembly, entitled “North Carolina Controlled Substances Act,” became effective. This new Act replaced the former “Narcotic Drug Act” which included G.S. 90-108, the statute under which defendant was convicted. The new Act provides that prosecutions for any violation of law occurring prior to 1 January 1972 “shall not be affected by these repealers, or amendments, or abated by reason, thereof.” No reference is made to the punishment to be imposed, and the offense for which defendant was convicted (formerly set forth in G.S. 90-108 and now set forth in G.S. 90-113.4) is reduced in the new Act from the grade of felony to that of a general misdemeanor. G.S. 90-113.4(b). The reduction inures to the benefit of defend-

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ant. *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765; *State v. Pardon*, 272 N.C. 72, 157 S.E. 2d 698; *State v. McIntyre*, 13 N.C. App. 479, 186 S.E. 2d 207 (1972). "A judgment is not final so long as the case is pending on appeal." *State v. Pardon*, *supra* at 75, 157 S.E. 2d at 701. The judgment is therefore modified to reflect the grade of offense as that of a misdemeanor and by striking the portion providing "nor more than three (3) years," thereby reducing the maximum period of defendant's sentence to two years imprisonment.

Modified and affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

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LEONARD FRANKLIN REGAN v. RONALD CURTIS PLAYER;  
PEGGY PLAYER; RICHARD EMORY MARION AND ELIZABETH  
CRAVEN MARION, GUARDIAN AD LITEM FOR RICHARD E. MARION

No. 7218DC142

(Filed 23 February 1972)

**1. Automobiles § 57—intersection collision—action against two drivers—sufficiency of evidence**

In this action for damages arising out of an automobile collision, plaintiff's evidence was sufficient to be submitted to the jury as to the negligence of both defendants where it tended to show that plaintiff's vehicle was stopped in the center lane of a three-lane dominant highway waiting to make a left turn into an intersecting street, that as the first defendant's vehicle came over a hill 150 feet away, the second defendant drove his vehicle from the servient street into the intersection and into the path of the first defendant's vehicle, that the first defendant swerved his vehicle into the center lane of the three-lane highway and collided head-on with plaintiff's vehicle, that the first defendant's vehicle left skid marks of 96 feet and that plaintiff's vehicle was knocked back 75 feet by the collision.

**2. Automobiles § 90; Negligence § 8—instructions on proximate cause**

In this action for damages arising out of an automobile collision, defendants were prejudiced by the court's failure properly to define proximate cause, including the element of foreseeability of injury, where the court's only instruction on proximate cause was that "A proximate cause is the cause that directly brings about the injury, either immediately or through happenings which follow one after another."

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APPEAL from *Haworth, Judge*, 23 August 1971 Session District Court, GUILFORD County.

This is an action for the recovery of damages for personal injury and property damage resulting from a collision which occurred at the intersection of U.S. 29A or old Greensboro Road and Manor Drive in the City of High Point on 31 July 1970. Plaintiff, driving a 1968 Rambler, had been proceeding in a westerly direction on U.S. 29A. As he approached the intersection of U.S. 29A with Manor Drive, he stopped in the left turn lane, which is the center of the three lanes on U.S. 29A, and waited for the vehicle driven by Ronald Curtis Player (Player) to pass before making his intended left turn. Player was approaching him on U.S. 29A traveling in an easterly direction. Richard E. Marion (Marion), driving a 1969 Chevrolet, had been traveling in a northerly direction on Manor Drive, and was stopped for a stop sign for northbound traffic on Manor Drive where it intersects with U.S. 29A. Plaintiff alleges in his complaint: "As the plaintiff's vehicle was stopped and [as] he was waiting for the defendant Player's vehicle to pass before making his left turn onto Manor Drive, the defendant, Richard Emory Marion, suddenly and without warning pulled out into the eastbound lane of traffic on U.S. 29A from his stopped position on Manor Drive. As the Marion vehicle pulled out from its stopped position on Manor Drive, the Player vehicle swerved to its left and into the center lane of the three lane highway and collided head-on with the plaintiff." Plaintiff alleges that Marion was negligent in that he failed to keep a proper look-out, failed to keep proper control of the vehicle he was driving, failed to yield the right-of-way to traffic approaching the intersection on the dominant highway, and failed to see if movement from a stopped position could be made safely. He alleges that Player was negligent in that he failed to keep a proper look-out, failed to keep proper control over his vehicle, failed to reduce his speed when approaching an intersection, failed to reduce his speed to avoid a collision, and failed to keep his vehicle in the lane for eastbound traffic but crossed over into the lane for westbound traffic.

Player filed answer, admitting the allegations of negligence as to Marion but denying negligence on his part. As an additional defense he averred the collision was caused solely by Marion's negligence. Also as an additional defense he pleaded

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that if he were negligent, his negligence was insulated by the intervening negligence of Marion. Included in his answer was a cross action against Marion for contribution and a cross action against Marion for damages for personal injuries and property damages.

Marion, answering the complaint, admitted Player's negligence and denied allegations as to his negligence. Marion denied all averments of the cross actions except as to ownership and operation of the automobile.

The jury returned a verdict for plaintiff against all defendants in the exact amount for which plaintiff had prayed. All defendants appealed.

*Bencini, Wyatt, Early and Harris, by A. Doyle Early, Jr., for plaintiff appellee.*

*Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and Eddie C. Mitchell, for Ronald Curtis Player and Peggy Player, defendant appellants.*

*Perry C. Henson and Daniel W. Donahue for Richard Emory Marion and Elizabeth C. Marion, defendant appellants.*

MORRIS, Judge.

Each defendant excepted to and has assigned as error the refusal of the court to allow motions for directed verdict and for judgment notwithstanding the verdict.

The evidence is uncontradicted that plaintiff was guilty of no negligence, nor does any defendant contend that plaintiff was guilty of contributory negligence. It is conceded by all parties that his vehicle was in a stopped position in the left turn lane with his left turn signals on and that he was awaiting the opportunity of making a left turn onto Manor Drive when the vehicle was struck by the Player vehicle.

Plaintiff testified that he first saw the Player vehicle or the lights therefrom, as it was coming over the hill, some 150 to 200 feet away. At that time, the Marion vehicle was still moving. "As to how long a period of time it was from when I first saw the Player vehicle approaching me from an opposite direction until the vehicle hit me, it was about 5 or 6 seconds, something like that." Plaintiff further testified that Player

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was doing the speed limit or better, that the speed limit was 45 miles per hour, and that he was knocked back "at least 50 or 75 feet, east up Greensboro Road." "... I saw the headlights coming, toward me and all of a sudden they just hit me." The Player vehicle struck the left front of plaintiff's vehicle. There is no traffic light at the intersection. Plaintiff never saw the Marion car come to a full stop at the intersection. The last time plaintiff saw the Marion car, the whole hood of the car was out in the intersection. Both drivers said they did not see the plaintiff. Plaintiff testified that there is a "stop light" at Manor Drive facing northbound traffic.

The investigating officer testified that the Player car left skid marks of 96 feet and that the plaintiff's car was "sitting approximately 75 feet back from the Greensboro Road in the eastbound lane." He estimated the distance from the hillcrest to the intersection at 150 feet. The Player car stopped at about the point of impact. The officer testified there was a stop sign on Manor Drive. He detected an odor of alcohol on Player, noted it on his report, but did not think Player was under the influence.

[1] When the evidence is viewed in the light most favorable to plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn, resolving all conflicts and inconsistencies in his favor, we are of the opinion that the court properly submitted the case to the jury as to both defendants. *Walker v. Pless*, 11 N.C. App. 198, 180 S.E. 2d 471 (1971).

[2] Each defendant has excepted to and assigns as error portions of the charge of the court. In the plaintiff's action against all defendants the following constitutes the court's entire charge on proximate cause: "A proximate cause is the cause that directly brings about the injury, either immediately or through happenings which follow one after another." In instructing the jury with respect to Player's cross action against Marion, the court did not give any instructions with respect to proximate cause.

In *Barefoot v. Joyner*, 270 N.C. 388, 154 S.E. 2d 543 (1967), the Court approved the definition of proximate cause given in *Nance v. Parks*, 266 N.C. 206, 146 S.E. 2d 24 (1966):

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"Proximate cause is 'a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.' *Mattingly v. R. R.*, 253 N.C. 746, 750, 117 S.E. 2d 844, 847. Foreseeable injury is a requisite of proximate cause, which is, in turn, a requisite for actionable negligence. *Osborne v. Coal Co.*, 207 N.C. 545, 177 S.E. 796." 270 N.C. at p. 393.

In *Ratliff v. Power Co.*, 268 N.C. 605, 614, 151 S.E. 2d 641 (1966), Justice Lake, for the Court, in discussing proximate cause and foreseeability, said:

"An event which is a 'but for' cause of another event—that is, a cause without which the second event would not have taken place—is not, necessarily, the proximate cause of the second event. While one event cannot be the proximate cause of another if, had the first event not occurred, the second would have occurred anyway, *Henderson v. Powell*, 221 N.C. 239, 19 S.E. 2d 876, the reverse is not necessarily true. A 'but for' cause may be a remote event from which no injury to anyone could possibly have been foreseen. Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which the plaintiff seeks to recover damages. *Nance v. Parks*, 266 N.C. 206, 146 S.E. 2d 24."

A proper definition of proximate cause is mandatory. *Keener v. Litsinger*, 11 N.C. App. 590, 181 S.E. 2d 781 (1971). Certainly under the facts of this case, defendants were prejudiced by the court's failure properly to define proximate cause, including the element of foreseeability of injury as a prerequisite thereof.

We are cognizant of the fact that the evidence at the next trial may be different in material respects. We, therefore, refrain from discussing, on the basis of evidence presently before us, questions presented by other assignments of error—some common to both defendants, others brought forward by either Marion or Player. For prejudicial error in the charge, discussed herein, both defendants are entitled to a

New trial.

Chief Judge MALLARD and Judge PARKER concur.

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Tisdale v. Elliott

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DILLARD W. TISDALE AND WIFE, REBECCA D. TISDALE v.  
LUTHER E. ELLIOTT

No. 7221DC19

(Filed 23 February 1972)

1. Evidence § 32—parol evidence rule

The parol evidence rule prohibits the use of parol evidence to vary, add to or contradict a written instrument.

2. Evidence § 32; Contracts § 26—parol evidence rule—evidence of defective condition of house

In this action to recover damages for breach of a contract to construct a house, the parol evidence rule was not violated by the admission of evidence of the condition of the house after its acceptance by plaintiffs.

3. Contracts § 23—acceptance of construction work—waiver of defects

The acceptance of work done under a construction contract with knowledge of a defective performance may be deemed a waiver of the defective performance, but an acceptance where the defect is unknown or latent does not waive the defective performance.

4. Contracts § 23—acceptance of construction work—underground drain pipe—latent defect

The defective condition of an underground drainpipe which caused water leakage into the basement of plaintiffs' home was a latent defect; consequently, plaintiffs' acceptance of the home did not waive such defect, and evidence of the defect was properly admitted in plaintiffs' action for breach of the contract to construct the home.

5. Contracts § 27—breach of construction contract—findings by court—sufficiency of evidence

In this action to recover damages for breach of a contract to construct a home, there was sufficient evidence to support the trial court's finding that underground drain tiles around the foundation of the house were improperly installed and that the basement walls were not waterproofed with asphalt, causing water leakage in the basement, and to support the court's finding of the amount of damages suffered by plaintiffs.

APPEAL by defendant from *Billings, District Judge*, at the May 17, 1971 Session of FORSYTH District Court.

The plaintiffs, Dillard W. Tisdale and his wife, Rebecca D. Tisdale, brought this civil action to recover damages alleged to have resulted from the breach by defendant of a contract to construct a house for the plaintiffs.

The evidence was conflicting and was heard by the judge without a jury.

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The evidence for plaintiff indicates a contract was entered into for the defendant to construct a house on a lot owned by the plaintiffs. The house was to be in accordance with the plans and specifications provided by the plaintiff. During the construction it was agreed that drain tiles would be installed around the foundation of the house. At the time plaintiffs occupied the house, water leakage into the basement was observed. Defendant advised that there would probably be no further leakage after the yard had been finally graded and settled. Defendant further promised that he would take care of any problem that persisted. Upon this assurance plaintiff made final payment. The leakage problem continued and damage occurred in certain finished rooms in the basement area. On several occasions the defendant attempted to stop the leakage, but these efforts were unsuccessful.

Plaintiff and defendant came to a parting of the ways over the basement leakage, and plaintiff employed a Mr. Marion. Marion dug out to the bottom of the foundation and discovered that drainage tile had been improperly laid. Marion repaired the drainage tile and regraded the yard. Thereafter, the leakage problem stopped. Plaintiff instituted this action for damages.

The defendant introduced evidence to the effect that he had advised plaintiff originally that due to the location of the lot and the grade of same that a water problem would be presented. Defendant contended that the drainage tile was not included in the contract and anyway the tile had been properly laid. He further contended that the grading of the yard was in accordance with directions furnished by the plaintiff, and that plaintiff had accepted the job and made final payment thereby consummating the entire transaction.

The judge as the trier of the facts found in favor of the plaintiff and awarded damages in the amount of \$1,000.00.

From this judgment, defendant appeals.

*Womble, Carlyle, Sandridge & Rice by Eddie C. Mitchell for plaintiff appellees.*

*Roberts, Frye & Booth by Leslie G. Frye for defendant appellant.*

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CAMPBELL, Judge.

The defendant raises three questions on appeal:

1. Did the trial court err in the admission of evidence?
2. Did the trial court err in making findings of fact not supported by any competent evidence, and in making the conclusion of law based upon erroneous findings of fact and lack of evidence?
3. Did the trial court err in failing to grant defendant's motion for a directed verdict at the conclusion of the plaintiffs' evidence and again at the conclusion of all the evidence and in the signing and entry of the judgment as appears of record?

The defendant's argument on the first question is that the trial court erred in admitting parol evidence in derogation of the written contract and of events occurring after final settlement.

The defendant made numerous objections to evidence introduced by plaintiff. This evidence was testimony as to the condition of the house after its completion by defendant and its acceptance by the plaintiff. Defendant argues that by the terms of the contract acceptance of the house by the plaintiff was a waiver of any known defects and therefore any evidence of conditions known to plaintiff at the time of acceptance is inadmissible.

**[1, 2]** The parol evidence rule prohibits the use of parol evidence to vary, add to, or contradict a written instrument. Stansbury, N. C. Evidence 2d Ed., Sec. 251. The evidence to which defendant objected did not in any way vary, add to, or contradict the written contract. It was evidence of the condition of the house after acceptance by the plaintiff. It was evidence in support of plaintiff's allegation that defendant had breached the contract by failing to perform in a workmanlike manner.

The defendant argues that the defects in the plaintiff's house were known to plaintiff at the time of acceptance; that acceptance waived any known defects and that evidence of known defects was therefore inadmissible. We do not agree with the argument.

**[3, 4]** It may be conceded that the plaintiff knew of a water problem at the time of acceptance. But the alleged cause of this

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problem was the defective condition of a buried drainpipe. This defect, covered by several feet of earth, was certainly a latent defect. We agree with defendant that acceptance with knowledge of a defective performance may be deemed a waiver of the defective performance. But acceptance where the defect is unknown, or latent, does not waive the defective performance. *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 160 S.E. 2d 476 (1968). The defect in the case before us was a latent defect. There was no error in the admission of evidence tending to establish a latent defect.

The defendant's second argument is that the judge made findings of fact not supported by any competent evidence.

The defendant assigns as error findings of fact Nos. 9 and 10 as follows:

"9. The defendant failed to perform the work on the foundation in a workmanlike manner in that the drain tiles were laid 18 inches away from the building foundation, they were not properly placed so as to form a continuous drain, they were not covered with suitable substance to prevent mud and silt from entering them, and the walls were not waterproofed with asphalt. This condition was not known to the plaintiffs at the time of payment under the contract.

10. That by reason of the failure of the defendant to perform the contract in a workmanlike manner, the plaintiffs have been damaged in the following respects:

(a) They have expended \$650.00 in having the drain tiles relaid and the basement walls waterproofed, which amount is found to be reasonable.

(b) They have spent 200 hours cleaning water and tar from their basement walls and floor, and the reasonable value of such labor is \$300.00.

(c) The bedroom and washroom walls are damaged by water and tar and the reasonable cost of repairs due to such damage is \$50."

[5] There is ample evidence to support finding of fact No. 9 in the testimony of plaintiff's witness Joe B. Marion. Mr. Marion testified that the drains were staggered, not together; that

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nothing covered the joints; that the drains were half filled with mud and debris and that the tiles were laid 18 inches from the building foundation. There was further evidence that plaintiff was unaware of these conditions until Mr. Marion dug down to the drains to inspect them. There was also testimony that the walls of the basement had not been waterproofed and that the tiles, as they were laid were improper for drainage purposes.

The defendant presented evidence that the tiles were properly laid. But where there is a conflict in the evidence the question is one of fact to be determined by the trial court. *Burgess v. Gibbs*, 262 N.C. 462, 137 S.E. 2d 806 (1964). Where the findings of the trial court are supported by competent evidence they will not be disturbed on appeal. *Chappell v. Winslow*, 258 N.C. 617, 129 S.E. 2d 101 (1963). Competent evidence supports the findings in the case before us.

There is also sufficient evidence to support finding of fact No. 10. There is evidence as to the cost of relaying the drain tiles, the amount of labor required to clean the house after the leakage, the cost of labor and the cost of repairing the walls inside the house. The trial court's findings will not be disturbed.

The defendant contends that his motions for directed verdict should have been sustained. Viewing the evidence in the light most favorable to the plaintiff, there is ample evidence of a factual question for determination by the trier of the facts, and this was the judge in this case. The evidence supported the findings of fact and these supported the conclusion of law.

In the entire trial we find

No error.

Judges MORRIS and PARKER concur.

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State v. Turner

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## STATE OF NORTH CAROLINA v. DAVID McNEIL TURNER

No. 7219SC72

(Filed 23 February 1972)

**1. Automobiles § 139; Appeal and Error § 48— speed competition — communication between occupants of the two vehicles**

In a prosecution for wilfully engaging in speed competition on a public highway, defendant was not prejudiced by the solicitor's question, "They were communicating in some manner with one another?" and the witness' answer, "Yes sir," where the witness had previously testified without objection that "there was some hollering between the occupants of the vehicle going on while they were sitting at the red light."

**2. Automobiles § 139— speed competition on highway — failure to define "wilfully" and "speed competition"**

In a prosecution for wilfully engaging in speed competition on a public highway, the trial court did not err in failing to define for the jury the word "wilfully" and the phrase "speed competition."

**3. Criminal Law § 138— trial de novo in superior court — increased sentence**

Upon trial *de novo* the superior court may impose a sentence in excess of that imposed in the court from which the appeal was taken.

**4. Automobiles § 139— race competition on public highway — warrant — use of word "race"**

Uniform Traffic Ticket charging that defendant "did unlawfully and wilfully operate the above-described motor vehicle on a street or highway: (x) Did unlawfully & willfully race on a N. C. Public Highway," held sufficient to charge a violation of G.S. 20-141.3(b), since the word "race," when used in conjunction with the operation of a motor vehicle on the highway, describes "speed competition with another motor vehicle."

APPEAL by defendant from *Thornburg, Judge*, 9 August 1971 Session of Superior Court held in CABARRUS County.

Defendant was tried and convicted under G.S. 20-141.3(b) which provides in pertinent part: "It shall be unlawful for any person to operate a motor vehicle on a street or highway wilfully in speed competition with another motor vehicle." The offense is alleged to have been committed on 29 January 1970. Defendant was tried and convicted in the Recorder's Court, Concord, North Carolina, on 23 April 1970, and was sentenced to confinement for a period of twelve months. It was provided that this sentence would be suspended on certain conditions, but defendant appealed to the Superior Court.

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In the Superior Court, defendant was tried *de novo* upon the original charge as contained in the "North Carolina Uniform Traffic Ticket" issued at the time of the alleged offense. The jury returned a verdict of guilty and defendant was sentenced to confinement for a period of nine months. He now has appealed to this court.

The State's evidence tended to show the following. At approximately one o'clock in the morning of 29 January 1970, Highway Patrolman McAbee was seated in his patrol car observing the intersection of Highway 29 and Davidson Drive. He was parked in the parking lot of a business establishment at the intersection. Defendant was driving a Chevrolet Corvette in a southerly direction on Highway 29. A Pontiac Firebird, operated by David Edwin Perry, was also traveling in a southerly direction on Highway 29. Both vehicles slowed and stopped, side by side, at the intersection in obedience to an electrically operated traffic control signal. Patrolman McAbee could not understand what they were saying, "but they were hollering back and forth at one another." When the traffic control light turned green, both vehicles accelerated hard. "They took off real fast side by side." Patrolman McAbee immediately began pursuing them. The two automobiles remained side by side for approximately a tenth of a mile, and then the Corvette began pulling away from the Firebird. The highest speed the two vehicles attained was ninety miles per hour. Patrolman McAbee was able to apprehend the defendant as he slowed to turn into the parking lot of a restaurant about a mile south of the intersection where he was first observed. The defendant offered no evidence.

*Attorney General Morgan, by Associate Attorney Lloyd, for the State.*

*Davis, Koontz & Horton, by Clarence E. Horton, Jr., for the defendant.*

BROCK, Judge.

[1] Defendant assigns as error that the trial judge allowed the following question and answer by the State's witness, Patrolman McAbee:

"Q. They were communicating in some manner with one another?

A. Yes sir."

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It seems that the State's case would have been equally as strong had the question not been asked; however, we fail to see how the question and answer could be prejudicial to defendant. Immediately preceding the question and answer, the witness testified:

"The Corvette and the Pontiac were sitting side by side at the light, and there was some hollering between the occupants of the vehicles going on while they were sitting at the red light. I could not understand or make out what they were saying, but they were hollering back and forth at one another."

This assignment of error was overruled.

[2] Defendant next assigns as error that the trial judge failed to define for the jury the word "willfully" and the phrase "speed competition." The word "willfully" is generally understood and has no special definition when applied to the law; it requires no definition by the judge. The phrase "speed competition," as used in the statute under which defendant was tried [G.S. 20-141.3(b)], is perfectly clear and requires no further definition. This assignment of error is overruled.

[3] Defendant assigns as error that the trial judge in the Superior Court "provided for a sharply increased sentence over that imposed in Cabarrus County Recorder's Court." Upon trial *de novo* the Superior Court may impose sentence in excess of that imposed in the court from which the appeal to Superior Court was taken. *State v. Speights*, 280 N.C. 137, 185 S.E. 2d 152. This assignment of error is overruled.

[4] Defendant assigns as error that the trial judge denied his motion to arrest judgment. Defendant moved to arrest judgment contending that the allegation upon which he was tried did not state an offense. The portion of the "North Carolina Uniform Traffic Ticket" of which defendant complains reads as follows:

"The affiant being duly sworn, says that the above-named defendant, on or about the above-stated violation date in the above-named county, did unlawfully and willfully operate the above-described motor vehicle on a street or highway: (x) Did unlawfully & willfully race on a N.C. Public Highway GS 20-141.3(B)"

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**Hayes v. Griffin**

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Defendant argues that the word "race" is not the equivalent of "speed competition with another motor vehicle" as condemned by the statute. It is advisable to charge in the words of the statute whenever possible; and where the blank space is limited on the uniform traffic ticket, a separate and more specific warrant should be issued. Nevertheless, we hold that defendant was adequately advised of the specific charge against him and the allegations are sufficient to support a later plea of former jeopardy. Inherent in the word "race" is speed competition of some type, and when used in conjunction with the operation of a motor vehicle on the highway, it leaves no doubt that the word describes "speed competition with another motor vehicle." This assignment of error is overruled.

No error.

Judges BRITT and VAUGHN concur.

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ALLEN L. HAYES AND WIFE, CAROLYN Y. HAYES v. WILLIAM T. GRIFFIN AND WIFE, PEARL T. GRIFFIN

No. 7220SC12

(Filed 23 February 1972)

**1. Contracts § 18; Vendor and Purchaser § 11— option contract — abandonment or waiver**

In the absence of a definite parol recision or abandonment of rights under an option contract, an abandonment or waiver of such rights is to be inferred only from positive and unequivocal acts and conduct which are clearly inconsistent with the contract.

**2. Vendor and Purchaser § 11— option contract — cancellation — conduct of party to option — instructions**

In this action for specific performance of an option contract for the sale of land, the trial court did not err in failing to instruct the jury that an option could be cancelled by conduct which naturally and justly led the other party to believe that the option provisions had been waived, where there was no evidence of acts or conduct by plaintiffs which would justify the jury in finding that plaintiffs had positively and unequivocally acted inconsistent with the contract, and defendants made no objection to the only issue submitted to the jury as to whether the option was cancelled by subsequent oral agreement.

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**3. Husband and Wife § 3— agency of husband for the wife**

No presumption that the husband is acting as agent for the wife arises from the mere fact of the marital relationship.

**4. Husband and Wife § 3 —agency of husband for the wife — instructions**

The trial court did not err in failing to instruct the jury that as a matter of law plaintiff husband was acting as agent for plaintiff wife, that question having properly been submitted to the jury.

APPEAL by defendants from *Long, Judge*, 31 May 1971 Session of Superior Court held in UNION County.

The pertinent facts may be summarized as follows. On 19 May 1970, the plaintiffs, Mr. & Mrs. Allen L. Hayes, instituted an action against the defendants, Mr. & Mrs. William T. Griffin, seeking specific performance of an option contract signed under seal by the defendants on 25 July 1969. This contract granted the plaintiffs a right and option until 1 December 1969 to purchase from the defendants a certain tract of land (approximately 110 acres) lying in Marshville Township, Union County, North Carolina. The defendants in their answer admitted execution of the option and further admitted that plaintiffs tendered payment and requested a conveyance of the land according to its provisions. However, defendants alleged as a defense that plaintiffs made an oral cancellation of the option in September, 1969.

The jury found for its verdict that the option agreement had not been cancelled by subsequent oral agreement as alleged by defendants. The trial court ordered defendants to specifically perform the contract by conveying to plaintiffs the land in question upon the payment to the defendants of the stipulated purchase price. Defendants appealed.

*Thomas and Harrington, by L. E. Harrington, for plaintiffs.*

*James E. Griffin for defendants.*

BROCK, Judge.

Defendants' answer and evidence at trial, and the thrust of their arguments on this appeal, are centered upon their contention that plaintiffs had cancelled the option to purchase the tract of land by subsequent oral agreement.

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Hayes v. Griffin

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Defendants bring forward eight assignments of error, but in their brief they abandoned three of these—numbers 1, 6 and 8.

In defendants' second and third arguments (assignments of error numbers 2 and 3 respectively), they contend that the trial judge committed error when he instructed the jury that the issue was whether this option agreement was cancelled by the subsequent oral agreement. Defendants maintain that they did not receive the full benefit of law in the charge in that an option could be cancelled when the prospective purchaser waived said option by conduct which naturally and justly lead the other party to believe that the option provisions have been waived.

[1, 2] In the absence of a definite parol rescision or abandonment of rights under an option contract, an abandonment or waiver of such rights is to be inferred only from positive and unequivocal acts and conduct which are clearly inconsistent with the contract. *Bell v. Brown*, 227 N.C. 319, 42 S.E. 2d 92. In our opinion, there is no evidence in this case of acts or conduct by plaintiffs which would justify the jury in finding that plaintiffs had positively and unequivocally acted inconsistent with the contract. Therefore, no instruction by the judge upon this principle of law was required.

We note also that defendants' pleading and the issue submitted to the jury referred only to an oral cancellation. The issue was as follows:

"Was the option agreement marked Court's Exhibit # 1 cancelled by subsequent oral agreement as alleged in the defendants' answer?"

Defendants lodged no objection to the issue as submitted and they did not tender other issue; therefore, no question of abandonment or waiver by conduct was required to be presented. These assignments of error are overruled.

Defendants' argument number four is an interesting recommendation for expository speaking, but we do not agree that the instruction complained of was misleading. In our opinion, there is no reasonable cause to believe that the jury was misled or misinformed on the burden of proof.

Defendants' final argument (assignments of error numbers 5 and 7) is based on the contention that Allen L. Hayes

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was the agent of his wife. They argue that the trial judge should not have left the jury free to determine whether the husband was acting as agent for the wife. In effect, the defendants contend that the judge should have peremptorily instructed the jury that the husband was the agent for the wife.

[3] No presumption that the husband is acting as agent for the wife arises from the mere fact of the marital relationship, *Sheppard v. Andrews*, 7 N.C. App. 517, 173 S.E. 2d 67, but rather there must be proof of the agency. *Beaver v. Ledbetter*, 269 N.C. 142, 152 S.E. 2d 165. The evidence in this case would justify, but does not impel the jury to find that Allen L. Hayes was acting as agent for his wife.

[4] Defendants rely upon the holding in *Dobias v. White*, 240 N.C. 680, 83 S.E. 2d 785, to support their contention that the court should declare as a matter of law that Allen L. Hayes was acting as agent for his wife. We do not interpret *Dobias* as supporting defendants' argument. In the first place, the facts in *Dobias* are so substantially different from those of the instant case that the two cases are distinguishable on the facts alone. In the second place, the language in *Dobias* relied upon by defendants is simply *obiter dictum*. Appellants in *Dobias* abandoned their assignment of error relative to a finding of agency by the trial court; therefore, no discussion of the agency question was necessary to a decision in the case. In the third place, in *Dobias* the parties waived trial by jury and the trial judge was acting as a "finder of facts" when he found that the husband was acting as agent for the wife. He did not rule as a matter of law. In the instant case, the trial judge submitted the question to the jury for it to find the facts from the evidence. In doing so he did not commit error.

No error.

Judges HEDRICK and VAUGHN concur.

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Wilson v. Chemical Co.

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DOUGLAS O. WILSON, PLAINTIFF v. E-Z FLO CHEMICAL COMPANY,  
A DIVISION OF GROWERS SERVICE, CORPORATION, DEFENDANT AND THIRD  
PARTY PLAINTIFF v. UNIROYAL CHEMICAL, A DIVISION OF UNI-  
ROYAL, INCORPORATED, THIRD PARTY DEFENDANT

No. 724SC170

(Filed 23 February 1972)

**1. Sales § 17; Uniform Commercial Code § 15— chemical herbicide—  
squash crop— warranty of fitness**

The evidence was sufficient to support the trial court's finding that the manufacturer of the chemical "Alanap" expressly and impliedly warranted that it was fit and proper to be used as a pre-emergent herbicide for control of grasses and weeds in a squash crop, where it tended to show that the chemical was placed on the market for use in killing weeds and grasses when applied to certain crops enumerated on the label, including squash, and that a manual provided by the manufacturer recommended the chemical for squash as a pre-emergent herbicide.

**2. Negligence § 10; Sales § 17— breach of warranty of fitness — action  
against manufacturer — intervening negligence by retailer**

In an action against a manufacturer for breach of warranty of fitness of a pre-emergent herbicide for use on a squash crop, the failure of the retailer of the herbicide to give plaintiff the warning furnished by the manufacturer in its herbicide manual against use of the product "on vine crops of any kind when growing conditions are very adverse; namely in early spring when weather is cold and wet" held not to constitute intervening negligence by the retailer where it does not appear from the evidence that the growing conditions were "very adverse," as defined in the manufacturer's manual, when the herbicide was used by plaintiff.

APPEAL by third party defendant from *James, Judge*, April 1971 Session of SAMPSON Superior Court.

Plaintiff brought this action against E-Z Flo Chemical Company, defendant and third party plaintiff, (E-Z Flo) to recover damages alleged to have resulted from the use of a chemical known as Alanap which was applied by plaintiff to a newly planted squash crop. Plaintiff alleged breach of an express and implied warranty that the product was suitable for use as a pre-emergent herbicide and that E-Z Flo knew the purpose for which the product was intended. E-Z Flo denied such breach and filed a third party complaint against Uniroyal Chemical (Uniroyal) as a third party defendant. E-Z Flo alleged the primary liability for plaintiff's loss rested with the manufacturer, Uniroyal, maintaining that no warranties were made

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Wilson v. Chemical Co.

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by E-Z Flo to plaintiff other than those made to E-Z Flo by Uniroyal. Uniroyal denied any breach of warranty and alleged as an affirmative defense the active and intervening negligence of E-Z Flo in not giving plaintiff the warning furnished by Uniroyal in its Herbicide Marketing Manual against the use of Alanap "on vine crops of any kind when growing conditions are very adverse; namely in early spring when weather is cold and wet."

By consent the court heard the case without a jury. The court found that plaintiff was damaged in the amount of \$7,620 by the breach of warranty on the part of E-Z Flo, but that Uniroyal was primarily liable to plaintiff by virtue of a breach of warranty in its manufacture and distribution of Alanap. Uniroyal appealed.

*Chambliss, Paderick & Warrick by Joseph B. Chambliss for third party plaintiff appellee.*

*Smith, Anderson, Dorsett, Blount and Ragsdale by John L. Jernigan for third party defendant appellant.*

BRITT, Judge.

Appellant first contends that the evidence was not sufficient to support a finding by the court that Uniroyal breached a warranty of fitness for a particular use. We hold that the evidence was sufficient to support the finding. G.S. 25-2-314(1) provides, "Unless excluded or modified (§ 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . ." G.S. 25-2-314(2) (c) provides, "Goods to be merchantable must be at least such as are fit for the ordinary purposes for which such goods are used; . . . ." G.S. 25-2-315 provides, "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [§ 25-2-316] an implied warranty that the goods shall be fit for such purpose."

[1] In this case Uniroyal caused to be placed on the market a product, Alanap, to kill weeds and grasses when applied to certain crops enumerated on the label, among which is squash.

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Wilson v. Chemical Co.

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E-Z Flo was a distributor of Alanap. Certain manuals were provided E-Z Flo by Uniroyal to guide E-Z Flo in the sale of the product. Everything else about the product was solely within the knowledge of Uniroyal. The manual referred to by E-Z Flo recommended Alanap for squash as a pre-emergent herbicide. The containers were sealed and were delivered by E-Z Flo as received from Uniroyal. The product was warranted by Uniroyal to be fit for the uses described and shown upon the labels attached to the containers. No warranties were made to the plaintiff by E-Z Flo other than those which were made to it by Uniroyal. "We know of no reason why \* \* \* they (assurances on the label) should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended." *Simpson v. Oil Co.*, 217 N.C. 542, 546, 8 S.E. 2d 813, 816 (1940). The evidence was plenary to show that Uniroyal expressly and impliedly warranted to the world that its product, Alanap, was fit and proper to be used as a pre-emergent herbicide for control of grasses and weeds in a squash crop. In light of the evidence, the question was one of fact for the judge sitting as a jury to determine. The court's findings of fact are conclusive upon appeal if supported by any competent evidence. *Pendergrass v. Massengill*, 269 N.C. 364, 152 S.E. 2d 657 (1967).

[2] Appellant next contends that even if there were a breach of warranty by Uniroyal, there was active and intervening negligence by E-Z Flo. Appellant contends that the failure of E-Z Flo to read the warning in the manual against the use of Alanap "on vine crops of any kind when growing conditions are very adverse; namely in early spring when weather is cold and wet" constituted negligence which precludes indemnity from Uniroyal. From the evidence presented at trial, it does not appear that the growing conditions were "very adverse" as defined by Uniroyal in its manual. Therefore, the failure to read the warning would seem to be immaterial, but the resulting question of negligence is again a question of fact. The parties having waived trial by jury, the findings of fact, supported as they are by the evidence, are binding upon this court on appeal. *Young v. Insurance Co.*, 267 N.C. 339, 148 S.E. 2d 226 (1966).

The judgment appealed from is

Affirmed.

Judges BROCK and VAUGHN concur.

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**State v. Martin**

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**STATE OF NORTH CAROLINA v. ISAIAH MARTIN**

No. 7217SC113

(Filed 23 February 1972)

**1. Automobiles § 3— driving while license was suspended — warrant**

A warrant for driving while driver's license was suspended is not fatally defective in failing to allege that defendant was driving upon a "public" street or highway, since the statute under which defendant was charged, G.S. 20-28, uses the phrase "highways of the State."

**2. Indictment and Warrant § 9— sufficiency of warrant**

A warrant must be sufficient in form to express the charge against defendant in a plain, intelligible and explicit manner and to enable the court to render a judgment and thus bar a subsequent prosecution for the same offense.

**3. Criminal Law § 127— arrest of judgment — defective warrant or indictment**

A motion in arrest of judgment on the ground of a defective warrant or indictment will not be granted unless it is so defective that judgment cannot be pronounced on it.

**4. Automobiles § 2— failure to post security — suspension of license — constitutionality**

The North Carolina provisions for suspension of an automobile driver's license for failure to post security fully comply with constitutional requirements. G.S. 20-279.5.

**5. Automobiles § 2— revocation of license — collateral attack**

The revocation of a driver's license for failure to post security may not be collaterally attacked in a prosecution for driving while license was revoked or suspended.

APPEAL by defendant from *Exum, Judge*, 16 August 1971 Session of Superior Court held in ROCKINGHAM County.

On August 23, 1970, the defendant, Isaiah Martin, was arrested and charged with driving a motor vehicle during a period of suspension of his driver's license.

The defendant was tried and convicted in the District Court. He appealed to the Superior Court.

On August 20, 1971, defendant was tried before a jury in Rockingham Superior Court. The jury returned a verdict of guilty and judgment was entered on the verdict. A suspended sentence was imposed.

From the verdict and judgment, defendant appeals.

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State v. Martin

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*Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.*

*Smith and Patterson by Norman B. Smith and J. David James for defendant appellant.*

CAMPBELL, Judge.

The defendant raises two questions on appeal to this Court:

1. Did the trial court err in failing to quash the warrant on the grounds that it did not allege all the essential elements of the offense for which the defendant was tried and convicted?

2. Did the trial court commit error in admitting a record of the suspension of defendant's driver's license where the suspension was imposed without a hearing?

[1] The defendant contends that the warrant on which he was tried was fatally defective because it failed to allege that defendant was driving on a "public" highway.

The warrant alleged that the defendant, "did unlawfully and wilfully operate the above-described motor vehicle on a street or highway" during a period of suspension of his driver's license.

We do not agree with defendant that the word "public" is essential to a proper allegation of the offense charged. The statute which defendant is charged with violating does not use the term "public" highway, but instead uses the phrase, "the highways of the State." G.S. 20-28. If we were to accept defendant's argument, a warrant charging the offense in the words of the statute would be defective, contradicting the generally accepted rule that a warrant drawn in the language of the statute is sufficient when it charges the essentials of the offense in a plain, intelligible and explicit manner. *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913 (1969).

The defendant relied on the cases of *State v. Cook*, 272 N.C. 728, 158 S.E. 2d 820 (1968); *State v. Blacknell*, 270 N.C. 103, 153 S.E. 2d 789 (1967); *State v. Newborn*, 11 N.C. App. 292, 181 S.E. 2d 214 (1971); and *State v. Harris*, 10 N.C. App. 553, 180 S.E. 2d 29 (1971). All of these cases are distinguishable. In *Cook* the warrant contained no allegation that defendant was driving on *any* street or highway. In *Blacknell* the warrant

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State v. Martin

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failed to allege that defendant was driving on a highway *while* his license was suspended. In *Newborn* the judge failed to instruct properly on the issue of whether the defendant's license was suspended. In *Harris*, a review of the record reveals that the judge failed to charge that an element of the offense was that defendant be driving on a street or highway. None of these cases held that the word "public" was essential to the warrant.

[2] All that is required of a warrant is that it is sufficient in form to express the charge against the defendant in a plain, intelligible and explicit manner and to contain sufficient matter to enable the court to render a judgment and thus bar subsequent prosecution for the same offense. *State v. Hammond*, 241 N.C. 226, 85 S.E. 2d 133 (1954). We believe that the warrant before us meets these requirements.

[3] A motion in arrest of judgment on the ground of a defective warrant or indictment will not be granted unless it is so defective that judgment cannot be pronounced upon it. *State v. Sauls*, 190 N.C. 810, 130 S.E. 848 (1925). No such defect appears in this warrant.

The defendant's second proposition is that the revocation of the defendant's driver's license was invalid and therefore the State has failed to prove one of the elements of the offense, *i.e.*, that the defendant's license was in lawful suspension when the offense occurred.

[4] The defendant contends that the suspension order is void upon its face and may be collaterally attacked. The defendant relies upon *Bell v. Burson*, 402 U.S. 535, 29 L.Ed. 2d 90, 91 S.Ct. 1586 (1971). The *Bell* case construed a statute of the State of Georgia and held that the Georgia financial responsibility scheme did not comply with constitutional principles. North Carolina, on the other hand, is a compulsory insurance state, and the financial responsibility scheme in North Carolina is thus different from that of the State of Georgia. The *Bell* case is further distinguishable for that in North Carolina ample review is provided before a driver's license suspension becomes effective. G.S. 20-279.2. *Carter v. Scheidt*, 261 N.C. 702, 136 S.E. 2d 105 (1964); *Joyner v. Garrett*, 279 N.C. 226, 182 S.E. 2d 553 (1971). We are of the opinion that the North Carolina provisions for suspension of an automobile driver's license fully comply with the constitutional requirements of the *Bell* case.

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[5] In addition to the fact that the *Bell* case is inapplicable the defendant in the instant case has attempted to attack the revocation of the driver's license collaterally in this proceeding, and this cannot be done. *State v. Ball*, 255 N.C. 351, 121 S.E. 2d 604 (1961); *Robinson v. Casualty Co.*, 260 N.C. 284, 132 S.E. 2d 629 (1963).

The defendant has raised other questions on this appeal which are contingent upon a finding that the suspension of defendant's driver's license was invalid. In view of our holding above, these questions need not be discussed.

No error.

Judges MORRIS and PARKER concur.

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VALERIE H. PARKER v. RHONDLE M. PARKER

No. 7221DC18

(Filed 23 February 1972)

1. Divorce and Alimony § 21— support payments — nonresident — posting of bond

The court properly required defendant husband to post a security bond of \$2,000 to secure his compliance with a judgment requiring him to make monthly payments for support of his wife and children, where the court found that defendant no longer resides within this State and that he has no attorney of record in the case. G.S. 50-16.7(b); G.S. 50-13.4(f) (1)

2. Divorce and Alimony § 21; Husband and Wife § 11— support payments — consent judgment — contempt proceedings

Where, in the wife's action for alimony and child support, the parties agreed to the terms of a judgment providing that the husband would make specified monthly support payments, and the judgment entered by the court ordered the husband to make the payments which he had agreed to make, the husband's obligation to make the support payments may be enforced by contempt proceedings.

APPEAL by defendant from *Clifford, District Judge*, 17 June 1971 Session of District Court held in FORSYTH County.

On 11 April 1969 plaintiff filed action against her husband for alimony, and custody and support of minor children born of

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the marriage. When the matter came on for final hearing the parties agreed upon a settlement as to all issues in controversy and consented to a judgment which was entered by Judge Rhoda B. Billings, 14 November 1969.

The judgment recited the terms of the agreement of the parties and then provided, among other things: "NOW, THEREFORE, BY CONSENT, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff shall have the full custody, care and control of the minor children of the marriage above named, . . . and it is FURTHER ORDERED that the defendant shall pay \$200.00 per month to the plaintiff for the support of the plaintiff and minor children of the marriage, 1/3 to each, for a period of four months, and shall pay the same into the office of the Clerk of Superior Court of Forsyth County, beginning November 1, 1969, and continuing through February, 1970, and that beginning on March 1, 1970, the defendant shall pay the sum of \$250.00 into the office of the Clerk of Superior Court of Forsyth County, or 50% of his net income, whichever is greater, for the support of the plaintiff and minor children of the marriage, and the defendant shall furnish to the plaintiff such satisfactory evidence of his earnings and business expenses as the plaintiff may require."

On 24 May 1971, pursuant to a motion filed by plaintiff, defendant was ordered to appear in District Court in Forsyth County to show cause as to why he should not be held in contempt of court for failure to maintain support payments as provided by the consent judgment. Defendant appeared as ordered and moved to dismiss plaintiff's motion on the ground the judgment of 14 November 1969 "is a contract between the parties and not a judgment enforceable as by contempt proceedings." Defendant's motion to dismiss was denied and he accepted.

After a hearing, the court entered an order reciting that defendant's contempt, if any, had been purged by paying the accumulated arrearage of \$600.00 before the hearing. The order further provided that defendant pay \$100.00 counsel fees to plaintiff's attorney, and that he post a security bond of \$2,000.00 to secure his future appearance pursuant to processes issued in the cause, and to secure his compliance with orders previously entered.

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Defendant excepted to the order and appealed.

*Pettyjohn and Frenck by H. Glenn Pettyjohn for plaintiff appellee.*

*Wilson and Morrow by Harold R. Wilson for defendant appellant.*

GRAHAM, Judge.

[1] Defendant questions only whether the court had jurisdiction to entertain plaintiff's motion and not whether, if jurisdiction were present, the court could properly order him to post a bond. In passing we note that the court found that defendant no longer resides within this State and that he has no attorney of record in this case. Under these circumstances, requiring a bond was an appropriate method of enforcing the court's decree. See G.S. 50-16.7(b) ; G.S. 50-13.4(f) (1).

[2] The court had jurisdiction to hear the motion unless, as defendant contends, the consent judgment of November 1969 is a mere contract between the parties, approved by the court. We hold that the judgment is more than a contract because in it the court specifically orders defendant to make the payments which he agreed to make. In *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240, Justice Sharp, speaking for the court, clearly distinguishes between the kinds of consent judgments which are enforceable by contempt and those which are not:

"Consent judgments for the payment of subsistence to the wife are of two kinds. In one, the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. Since the court itself does not in such case order the payments, the amount specified therein is not technically alimony. In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony."

The judgment here is of the latter type. A court is not rendered powerless to enforce its decree because the terms of the decree have been consented to by the parties. *Mitchell v.*

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*Mitchell*, 270 N.C. 253, 154 S.E. 2d 71. The fact defendant consented to the terms of the judgment renders him under no less a duty to do what the court ordered than would be the case if there had been no consent.

Defendant attempts to argue that the judgment of 14 November 1969 does not contain sufficient findings of fact. Suffice to say, defendant did not except to that order but consented in writing to its provisions. He certainly may not attack it now.

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. ALEXANDER WILLIAMS

No. 7221SC86

(Filed 23 February 1972)

1. Witnesses § 1— competency of seven-year-old child to testify

The trial court did not abuse its discretion in determining that a seven-year-old child was competent to testify in this prosecution for breaking and entering and larceny.

2. Criminal Law § 87— leading questions — seven-year-old witness

The trial court in a breaking and entering and larceny prosecution did not abuse its discretion in permitting the solicitor to ask leading questions of a seven-year-old witness.

APPEAL by defendant from *Kivett*, Judge, 23 August 1971 Session of Superior Court held in FORSYTH County.

Defendant was charged in separate counts of a bill of indictment, proper in form, with breaking and entering and larceny.

The State offered evidence tending to show that Edna Everett left her house to visit a neighbor on 21 April 1971. The house was locked. She returned on the same day before dark and found that the glass was out of the back door and the door facing was off. Her daughter's television set was missing from the house. Neither Mrs. Everett nor her daughter gave anyone permission to enter the house or remove the television set.

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Coya West, a seven-year-old child, was called to testify as a witness for the State. Upon examination by defendant, the court directed a *voir dire* examination of the witness. The witness testified on *voir dire* that she is in the second grade and attends church and Sunday school regularly. She stated that she knows the meaning of an oath, explaining, "[I]f you tell a lie you will go to the devil." The witness responded accurately to various other questions concerning her age, residence and family.

The court found facts consistent with the witness' testimony and from these findings and from "observing the demeanor of the witness in the courtroom," concluded "that she does know the meaning of an oath and the impropriety and possible consequences of telling an untruth; and that she is an intelligent child and that she has responded intelligently to the questions that have been asked; and the Court concludes that she is a competent witness to testify at the trial of this case."

Coya West then testified before the jury that while riding her bike on the sidewalk on 21 April 1971, she observed defendant and another person remove the glass from the back door of Mrs. Everett's house, enter the house, and return later with a television set. She stated:

"I sat on my bike, saw them take the glass out, open the door and go in. I was right behind them. They went in the door and took the television out the window—out the door. Zeke had the TV when they came out. They went up by the churchyard on Lime. I ran back up there and told my daddy that I saw George, Jr., and Zeke took out Miss Edna's TV. I do not recall what I did after that. Zeke (Alexander Williams) has been to my house a lot of times. I do not know why Zeke was coming to my house."

The jury found defendant guilty of both charges. The counts were consolidated for judgment and defendant appeals from the judgment entered.

*Attorney General Morgan by Associate Attorney Speas for the State.*

*Curtiss Todd for defendant appellant.*

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GRAHAM, Judge.

[1] Defendant concedes that the competency of a child to testify as a witness is a matter resting in the sound discretion of the trial court. *State v. Bowden*, 272 N.C. 481, 158 S.E. 2d 493; *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406. He argues, however, that the court's finding in this case that the seven-year-old witness was competent amounts to an abuse of discretion. We do not agree.

Responses of the child to questions asked on voir dire indicate that she had a sufficient understanding to apprehend the obligations of her oath and that she was capable of giving a correct account of the events which she witnessed on 21 April 1971. In addition, the trial judge personally observed the demeanor of the child and properly considered this in concluding that she was a competent witness. "There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matter as to which it is called upon to decide. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness." *State v. Turner*, *supra* at 230, 150 S.E. 2d at 410.

[2] Defendant further contends that the court erred in permitting the solicitor to ask the seven-year-old witness leading questions. The record reflects the following:

"All right, now, Coya, on April 21, 1971, tell the Court

MR. TODD: I object to his leading questions.

THE COURT: Well, in light of the tender years of the child, the Court will permit leading questions to be put to her. Objection overruled.

MR. TODD: EXCEPTION.

EXCEPTION No. 2."

The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be reviewed on appeal in the absence of a showing of an abuse of discretion. *State v. Staten*, 271 N.C. 600, 157 S.E. 2d 225. "Leading questions are permissible when . . . a child of tender

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years . . . is testifying and his attention cannot otherwise be directed to the matter in question." Stansbury, N.C. Evidence 2d, § 31 at 59.

We find no abuse of discretion on the part of the trial judge in permitting the solicitor to ask leading questions of the seven-year-old witness. Moreover, it is noted that except for the question which prompted defendant's objection, no questions by the solicitor are set forth in the record, all of the child's testimony being in the narrative. In view of this, it is impossible to tell whether the solicitor actually asked leading questions as the court had indicated he could do.

Defendant's final contention is that the court erred in overruling his motion to dismiss the charges as of nonsuit. This contention is obviously without merit.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

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STATE OF NORTH CAROLINA v. DONALD TRUESDALE  
AND GARY A. GARRETT

No. 7221SC152

(Filed 23 February 1972)

1. Criminal Law § 26; Indictment and Warrant § 14— appeal from district court — trial upon warrants — indictments returned — motion to quash

The superior court did not err in refusing to quash on the ground of double jeopardy indictments which were inadvertently sent to the grand jury when defendants appealed from their district court convictions of nonfelonious receiving of stolen property, where the State did not proceed in the superior court under the indictments but tried defendants upon the warrants on which they were tried in the district court, defendants not being placed twice in jeopardy by the mere existence of the indictments.

2. Receiving Stolen Goods § 2— sufficiency of warrant

Warrants were sufficient to charge defendants with the crime of receiving stolen property.

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**3. Indictment and Warrant § 12— receiving stolen property — appeal from district court — amendment of warrant — ownership of property**

Upon defendants' appeal from conviction in the district court, the superior court did not err in allowing the State's motion to amend warrants for receiving stolen goods by placing the words "James Cathey, Jr. and Robert M. Sauls, Trading as" after the words "the property of" and prior to the words "Man-Trap Wigs," since the original warrants charged all the essential elements of the offense of receiving stolen goods, and the amendment describing ownership of the property in more detail did not change the offense with which defendants were charged.

**4. Criminal Law § 43— photographs of defendants — illustrative purposes**

In this prosecution for receiving stolen property, photographs of defendants were properly admitted for the limited purpose of illustrating the testimony of witnesses.

**5. Receiving Stolen Goods § 5— sufficiency of evidence**

The State's evidence was sufficient for the jury in this prosecution for receiving stolen property.

APPEAL by defendants from *Godwin, Special Judge*, 26 July 1971 Criminal Session of FORSYTH Superior Court.

The defendant Donald Truesdale was arrested under a warrant issued on 26 January 1971 charging in substance that:

"The undersigned, J. C. Hassell, being duly sworn, complains and says that at and in the County named above and on or about the 25th day of January, 1971, the defendant named above did unlawfully, wilfully, receive and have in his possession certain property, to wit: one human hair fall and four synthetic wigs of the value of \$142.70, *the property of Man-Trap Wigs, Parkway Plaza Shopping Center, Winston-Salem, N. C.*, he the said Donald Truesdale then and there well knowing the said property to have been feloniously stolen or taken under circumstances amounting to larceny.

The offense charged here was committed against the peace and dignity of the State and in violation of law GS 14-71." (Emphasis supplied.)

The defendant Gary A. Garrett was also arrested and charged under a warrant using language identical to that above. At trial in district court, defendants' motion to quash the warrants was denied. Defendants pleaded not guilty and appealed to the superior court from a judgment entered on a verdict of guilty.

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The State's motion to amend the warrants was allowed and the words "James Cathey, Jr. and Robert M. Sauls, Trading as" were inserted after the phrase "the property of" in the above mentioned warrants. The language of the warrants was in no other way changed. At trial in superior court, the defendants again entered pleas of not guilty and the jury found them guilty. The judgments as entered by the court read in part that the jury found defendants "guilty of the offense of RECEIVING STOLEN GOODS OF THE VALUE OF NOT MORE THAN TWO HUNDRED DOLLARS, KNOWING THEM TO HAVE BEEN STOLEN, which is a violation of GS 14-71 and punishable as provided in GS 14-72, and of the grade of misdemeanor;". Defendants appealed from the judgments and prison sentences imposed.

*Attorney General Morgan by Associate Attorney Price for the State.*

*Annie Brown Kennedy for defendant appellants.*

MORRIS, Judge.

[1] Appellants were tried in district court on the warrants, were found guilty and appealed to the superior court. From the record it appears that the State inadvertently sent bills of indictment to the grand jury but announced in open court "that the State does not propose to proceed under the bill of indictment, but rather under the warrant on which the defendant was tried in the District Court of this county . . ." Appellants assign as error the denial of a motion to quash the bills of indictment, alleging that their mere existence puts them in jeopardy twice for the same offense. A plea of former jeopardy is not a plea to the indictment but is a plea in bar to the prosecution which poses an inquiry into what action the court has taken on a former occasion. *State v. Davis*, 223 N.C. 54, 25 S.E. 2d 164 (1943); 2 Strong, N.C. Index 2d, Criminal Law § 26, pp. 515-524. Double jeopardy would not attach until such time as defendant was placed on trial for the same offense a second time. *State v. Birckhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962). Therefore, no prejudice has been shown. This assignment of error is overruled.

[2] Appellants also assign as error the superior court's denial of its motion to quash the warrants which charged them with receiving stolen property worth \$142.70 "in violation of law

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G.S. 14-71." The warrant sufficiently charged all the essential elements of the offense of receiving and adequately apprised the appellants of the offense with which they were charged.

[3] Appellants' next assignment of error is directed to the court's allowing the State's motion to amend the warrants to read "property of James Cathey, Jr. and Robert M. Sauls, Trading as Man-Trap Wigs." Judge Parker has said in *State v. Thompson*, 2 N.C. App. 508, 163 S.E. 2d 410 (1968), that:

"As a general proposition the superior court, on an appeal from an inferior court upon a conviction of a misdemeanor, has power to allow an amendment to the warrant, provided the charge as amended does not change the offense with which defendant was originally charged. *State v. Fenner*, 263 N.C. 694, 140 S.E. 2d 349; *State v. Wilson*, 227 N.C. 43, 40 S.E. 2d 449." At p. 512.

The original warrants, prior to amendment, charged all the essential elements of the offense of receiving stolen goods. *State v. Brady*, 237 N.C. 675, 75 S.E. 2d 791 (1953). Ownership of the stolen property was stated in the warrants merely to negative any ownership in the accused. *State v. Davis*, 253 N.C. 224, 116 S.E. 2d 381 (1960). We have previously held that it is not necessary that the warrant or indictment in a prosecution for receiving stolen goods state the names of those from whom the goods were stolen. *State v. McClure*, 13 N.C. App. 634, 186 S.E. 2d 609 (1972); *State v. Brady*, *supra*. Amending the warrants later to describe ownership of the property in more detail in no way changed the offense with which the appellants were charged. This assignment of error is overruled.

[4] Appellants excepted to the introduction of one photograph into evidence and objected to the use of another photograph. The photographs of the appellants were properly identified and entered into evidence for the purpose of illustrating the testimony of witnesses if the jury should find that they did illustrate the witness' testimony and the jury was so instructed. *State v. McKissick*, 271 N.C. 500, 157 S.E. 2d 112 (1967); *Smith v. Dean*, 2 N.C. App. 553, 163 S.E. 2d 551 (1968). This assignment of error is overruled.

[5] Defendants' remaining assignments of error challenge the sufficiency of the evidence to go to the jury and support a ver-

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dict. When the evidence is considered in the light most favorable to the State, there is ample evidence to submit the case to the jury, nor was error committed when the trial tribunal refused to set the verdict aside and grant a new trial.

Defendants were well represented by counsel of their choice. In a trial free from prejudicial error, the jury refused to accept defendants' contentions.

No error.

Judges CAMPBELL and PARKER concur.

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STATE OF NORTH CAROLINA v. JOHN MICHAEL FIDLER

No. 7219SC75

(Filed 23 February 1972)

1. Criminal Law § 91— denial of continuance—lack of counsel—un-supported statements by defendant

In this prosecution for willful failure to support an illegitimate child, the trial court did not abuse its discretion in the denial of defendant's motion for continuance based upon defendant's unsupported statement that he had employed private counsel, that when he attempted to consult with counsel three days before trial, he discovered that she had left the State, and that he desired to obtain other counsel.

2. Bastards § 2— failure to support illegitimate child—warrant

Warrant was sufficient to charge the offense of willful failure to support an illegitimate child in violation of G.S. 49-2.

3. Criminal Law § 23— guilty plea—voluntariness—showing in the record

The acceptance of defendant's guilty plea will not be disturbed on appeal where it appears that the trial judge made careful inquiry of the accused as to the voluntariness of his plea, and there is ample evidence to support the judge's finding that defendant freely, understandingly and voluntarily entered the plea of guilty.

APPEAL by defendant from *Thornburg, Judge*, 9 August 1971 Criminal Session of CABARRUS Superior Court.

Defendant was tried in the Cabarrus County Domestic Relation's Court on 21 September 1970 on a warrant charging unlawful failure to provide "support for his minor child, . . .

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the same being an illegitimate child begotten upon" Linda Kay Brown. He pleaded not guilty, was found guilty, and given a six months sentence suspended for five years upon paying costs and \$12.50 per week for the use and benefit of the child. Defendant appealed to superior court. When the case was called for trial in that court on 12 August 1971, defendant informed the court that he had employed private counsel in November of 1970; that he had paid counsel \$75.00; that when he attempted to consult with her three days before the trial, he discovered she had left the state; and that he had no funds to employ another attorney. Defendant moved for a continuance in order to obtain counsel. The motion was denied, defendant pleaded not guilty and the case went to trial. Defendant then changed his plea to guilty. After inquiry with respect to the plea and hearing evidence the court imposed a six months prison sentence from which defendant appeals.

*Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.*

*Thomas K. Spence for defendant appellant.*

BRITT, Judge.

[1] By his first assignment of error defendant contends that the trial court's refusal to continue the case was a denial of due process under the Fourteenth Amendment of the Constitution of the United States. We do not agree with this contention. A motion for continuance is ordinarily addressed to the sound discretion of the trial court and therefore is generally not subject to judicial review absent a showing of gross abuse of discretion. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967); *State v. Ferebee*, 266 N.C. 606, 146 S.E. 2d 666 (1966). The trial court in exercising its discretion in this case was presented only with the unsupported statement of defendant, with no affidavit submitted in support of the motion. No abuse of discretion appears. Defendant's contention that this denial violated his constitutional rights has no merit. In *State v. Green*, 8 N.C. App. 234, 174 S.E. 2d 8, 277 N.C. 188, 176 S.E. 2d 756 (1970), it was held that a charge of willful failure to support illegitimate children is not a serious misdemeanor requiring the appointment of counsel or an intelligent waiver thereof under the Sixth and Fourteenth Amendments to the United States Constitution. Defendant's first assignment of error is overruled.

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[2] Defendant next contends that the warrant under which he was charged was fatally defective. The warrant sufficiently charges the crime with reference to and in the language of the appropriate statute, averring all the essential elements of the crime which is a requirement for its validity. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). Although surplus words are used in the warrant, it still sets forth the necessary language of the statute in substance and hence we hold it is not defective.

[3] Finally, defendant contends that the guilty plea tendered by him was invalid for the reason that it was not freely and voluntarily given. The record reveals that defendant entered a plea of guilty in open court, that defendant signed the transcript of plea, and that the court made an adjudication that the plea was freely, understandingly and voluntarily made, all in compliance with the procedure approved in *State v. Harris*, 12 N.C. App. 570, 183 S.E. 2d 863 (1971). The acceptance of a defendant's guilty plea will not be disturbed on appeal where it appears that the trial judge made careful inquiry of the accused as to the voluntariness of his plea, and there is ample evidence to support the judge's finding that the defendant freely, understandingly and voluntarily pleaded guilty to the charges. *State v. Hunter*, 279 N.C. 498, 183 S.E. 2d 665 (1971). Defendant's contention has no merit and the assignment of error is overruled.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges BROCK and VAUGHN concur.

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STATE OF NORTH CAROLINA v. WILLIAM CLEVE ROBINSON

No. 7221SC79

(Filed 23 February 1972)

Assault and Battery § 17; Criminal Law § 124— felonious or aggravated misdemeanor assault — jury verdict

The clerk asked the jury if it found "defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury or do you find the defendant guilty of assault with a firearm inflicting serious injury or do you find him not guilty," whereupon the foreman stated, "We find him guilty with intent to kill." The court then asked,

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"Do you find him guilty of an assault with a deadly weapon with intent to kill, in that language?" and the foreman answered, "Yes, sir." The jurors answered positively the court's inquiry as to whether that was the verdict of all the jurors, and a sentence of five years was imposed. *Held*: The jury, by omitting the element of inflicting serious injury from its verdict, in effect found defendant guilty of an aggravated assault with a deadly weapon with intent to kill, a misdemeanor punishable by imprisonment not to exceed two years. G.S. 14-33(c).

APPEAL by defendant from *Braswell, Judge*, 9 August 1971 Session of Superior Court held in FORSYTH County.

The defendant, William Cleve Robinson, was charged in a bill of indictment, proper in form, with assaulting one Edward Byrd with a deadly weapon; to wit, a .32-caliber pistol, with intent to kill inflicting serious injury, in violation of G.S. 14-32(a). The defendant pleaded not guilty.

The evidence tends to show that on 22 May 1971, at about 3:45 p.m., the defendant got out of his car near the intersection of Thirtieth and Liberty Streets in Winston-Salem, North Carolina, and fired four shots from a .32-caliber pistol at Edward Byrd. Two of the bullets struck Byrd in the chest inflicting serious injury. Byrd was removed by ambulance to a hospital where he remained for seven days. The court, *inter alia*, instructed the jury as follows:

"In this case, there are three possible verdicts which you are to consider and one of which you are to return. They are first, guilty of an assault with a deadly weapon with intent to kill inflicting serious injury; or guilty of an assault with a firearm inflicting serious injury; or not guilty, according to how you, the jury, find the facts to be."

The verdict returned by the jury is as follows:

"THE CLERK: Members of the jury, have you agreed upon a verdict?

THE JURY FOREMAN: Yes, sir.

THE CLERK: And do you find the defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury or do you find the defendant guilty of assault with a firearm inflicting serious injury or do you find him not guilty?

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THE JURY FOREMAN: We find him guilty with intent to kill.

THE COURT: Do you find him guilty of assault with a deadly weapon with intent to kill, in that language?

THE JURY FOREMAN: Yes, sir.

THE COURT: Is that the verdict of all of you so say you all?

THE JURY: Yes, sir."

After reciting that the jury had found the defendant guilty of an assault with a deadly weapon with intent to kill inflicting serious injury, in violation of G.S. 14-32(a), the court imposed a prison sentence of five years. The defendant appealed to this Court.

*Attorney General Robert Morgan and Associate Attorney Ann Reed for the State.*

*Eubanks and Sparrow by W. Warren Sparrow for defendant appellant.*

HEDRICK, Judge.

The question presented by the defendant's one assignment of error is whether the verdict supports the judgment.

G.S. 14-32(a), prior to the amendment effective 1 October 1971, provided:

"Any person who assaults another person with a firearm or other deadly weapon of any kind with intent to kill and inflict serious injury is guilty of a felony punishable under G.S. 14-2."

G.S. 14-32(b), prior to the amendment effective 1 October 1971, provided:

"Any person who assaults another person with a firearm or other deadly weapon per se and inflicts serious injury is guilty of a felony punishable by a fine or imprisonment for not more than five years, or both such fine and imprisonment."

G.S. 14-33(b) (1) and (3), prior to the amendment effective 1 October 1971, provided:

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“(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any aggravated assault, assault and battery, or affray is guilty of a misdemeanor punishable as provided in subsection (c) below. A person commits an aggravated assault or assault and battery if in the course of such assault or assault and battery he:

- (1) Uses a deadly weapon or other means or force likely to inflict serious injury or serious damage to another person; or

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- (3) Intends to kill another person. . . .”

G.S. 14-33(c), prior to the amendment effective 1 October 1971, provided:

“(c) Any aggravated assault, assault and battery, or affray is punishable by a fine not to exceed five hundred dollars (\$500.00), imprisonment not to exceed six (6) months, or both such fine and imprisonment if the offense is aggravated because of one of the following factors:

- (1) Inflicting serious damage to another person;
- (2) Assaulting a female, by a male person; or
- (3) Assaulting a child under the age of twelve (12) years.

Any other aggravated assault, assault and battery, or affray is punishable by a fine in the discretion of the court, imprisonment not to exceed two (2) years, or both such fine and imprisonment.”

The element of inflicting serious injury common to the offense described in G.S. 14-32(a) and (b) is not an element of the offense described in G.S. 14-33(b) (1) and (3). The jury, by omitting the element of inflicting serious injury from its verdict, in effect, found the defendant guilty of an aggravated assault with a deadly weapon with intent to kill, a misdemeanor punishable by a fine in the discretion of the court, imprisonment not to exceed two years, or both such fine and imprisonment, as provided by G.S. 14-33(c). *State v. Gregory*, 223 N.C. 415, 27 S.E. 2d 140 (1943); *State v. Burris*, 3 N.C. App. 35, 164 S.E. 2d 52 (1968).

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Trust Co. v. Motors, Inc.

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We hold the judgment imposing a prison sentence of five years is not supported by the verdict. The judgment is vacated and the case is remanded to the superior court for the entry of a proper judgment on the verdict.

Vacated and remanded.

Chief Judge MALLARD and Judge GRAHAM concur.

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WACHOVIA BANK AND TRUST COMPANY, N.A. v. PARKER  
MOTORS, INC.

No. 7221SC54

(Filed 23 February 1972)

1. Appeal and Error § 7— right to appeal — party aggrieved

The right of appeal is limited by statute to the party aggrieved, G.S. 1-271; a party is not aggrieved unless the order complained of affects a substantial right, or in effect determines the action. G.S. 1-277.

2. Appeal and Error § 7— right to appeal — party aggrieved

In this action by a bank against an automobile dealer wherein a permanent receiver had been appointed for defendant automobile dealer, plaintiff bank is not a party aggrieved by the trial court's order denying plaintiff's motion to strike defendant's answer and counterclaim made on the ground that the receiver has succeeded to all the rights and privileges of defendant, since the denial of the motion does not affect a substantial right of plaintiff and does not in effect determine the action.

APPEAL by plaintiff from an Order of *Long, Judge*, filed 13 September 1971, following a hearing at the 30 August 1971 Session of Superior Court held in FORSYTH County.

On 11 June 1971, Wachovia Bank and Trust Company, N.A., the plaintiff-appellant hereinafter called "Wachovia", filed suit against Parker Motors, Inc., the defendant-appellee hereinafter called "Parker," seeking, *inter alia*, money damages, possession of certain automobiles, injunctive relief to prevent disposition of corporate assets, and appointment of a Receiver for Parker.

At the 31 May 1971 Session of Superior Court held in Forsyth County, Judge Lupton appointed a Temporary Receiver

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for Parker and gave notice to Parker to show cause on 25 June 1971 why the appointment should not be made permanent.

On 25 June 1971, after Parker, defendant-appellee, failed to appear at the designated time to show cause why a Permanent Receiver should not be appointed, Judge Lupton filed an Order appointing L. G. Gordon, Jr., as Permanent Receiver of Parker and empowering said Receiver to take into his possession and control all the property, assets, books, papers, and records of the said corporation, with all the duties, powers and obligations given by law to said Receiver. This order further restrained and enjoined all persons, firms, and corporations from interfering in any manner with the property or assets of Parker or with the Receiver in the exercise of his duties.

On 13 July 1971, Parker filed an answer and counterclaim against the plaintiff, Wachovia. Plaintiff, Wachovia, filed a motion to strike the defendant's answer and counterclaim.

The plaintiff's motion to strike was heard on 13 September 1971 before Judge Long. The trial court denied plaintiff's motion and ordered that the defendant, Parker, be at liberty to defend the case brought by the plaintiff against it and to prosecute its counterclaim against the plaintiff. The trial court further ordered that any recovery obtained by the defendant under said counterclaim would become an asset of the receivership.

Plaintiff appealed.

*Womble, Carlyle, Sandridge and Rice, by Zeb E. Barnhardt, Jr., and W. P. Sandridge, Jr., for plaintiff-appellant.*

*Eugene H. Phillips for defendant-appellee.*

BROCK, Judge.

Plaintiff argues that the Receiver has succeeded to all the rights and privileges of defendant; therefore, defendant has no right to defend itself or prosecute a counterclaim against plaintiff.

The Receiver has not undertaken to be substituted as the party defendant in defendant's answer and counterclaim and the Receiver has not appeared in the Superior Court or in this Court in opposition to defendant's effort to defend itself. It seems to us that if anyone has been aggrieved by the Order,

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denying the motion to strike defendant's answer and counterclaim, it is the Receiver. However, as pointed out above, the Receiver is not seeking to remove defendant from the lawsuit.

[1] Aside from the view that Rule 4, Rules of Practice in the Court of Appeals (as amended 20 January 1971), would deny to a party the right of appeal from an order such as the one complained of by plaintiff in this case, the right of appeal is limited by statute to a party aggrieved. G.S. 1-271. A party is not aggrieved unless the order complained of affects a substantial right, or in effect determines the action. G.S. 1-277. *Coburn v. Timber Corporation*, 260 N.C. 173, 132 S.E. 2d 340.

[2] The Order of Judge Long which denied plaintiff's motion to strike defendant's answer and counterclaim does not affect a substantial right of plaintiff, nor does it in effect determine the action. Plaintiff is at liberty to offer evidence to substantiate its own allegations and to offer evidence in defense against defendant's allegations.

The attempted appeal must be, and it is

Dismissed.

Judges BRITT and VAUGHN concur.

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STATE OF NORTH CAROLINA v. WILLIE FRANK MCCLURE

No. 7218SC146

(Filed 23 February 1972)

**1. Criminal Law § 146— appeal from guilty plea**

An appeal from a plea of guilty presents for review only the question whether error appears on the face of the record proper.

**2. Larceny § 4— defect in larceny count — judgment not imposed thereon**

Defect in the first count of an indictment charging felonious larceny is immaterial where defendant pled guilty only to the offense charged in the second count of the indictment, receiving stolen property, and no judgment was imposed on the offense of larceny charged in the first count.

**3. Receiving Stolen Goods § 2— indictment — persons from whom goods stolen**

It is not essential that an indictment for receiving stolen goods state the name of those from whom the goods were stolen.

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APPEAL by defendant from *Blount, Judge*, 6 September 1971 Session of Superior Court held in GUILFORD County.

In three separate bills of indictment defendant was charged as follows:

In Case No. 71CR31081 defendant was charged with a felonious assault with a deadly weapon, to wit: a pistol, inflicting serious injuries upon Janette Lee Smith.

In Case No. 71CR31082 defendant was charged with a felonious assault with a deadly weapon, to wit: a pistol, with felonious intent to kill, inflicting serious injuries upon Eddie B. Little.

In Case No. 71CR38916 defendant was charged in two counts with: (1) felonious larceny of property of the value of \$300.00; and (2) receiving stolen property of the value of \$300.00, knowing the same to have been feloniously stolen.

Defendant, represented by court-appointed counsel, was brought to trial on his plea of not guilty in Case No. 71CR31082. Evidence was presented by the State and by the defendant. At the close of defendant's evidence and in the absence of the jury, defendant, through counsel, withdrew his plea of not guilty, and tendered a plea of guilty to the lesser included offense of assault with a deadly weapon inflicting serious injury. At the same time, in Case No. 71CR31081 defendant tendered a plea of guilty to the lesser included offense of assault with a deadly weapon. In Case No. 71CR38916 defendant tendered a plea of guilty to the offense of receiving stolen property of the value of not more than \$200.00, knowing the same to have been feloniously stolen, a lesser degree of the offense charged in the second count of the bill of indictment in that case. Before approving acceptance of the pleas, the trial judge carefully examined defendant as to whether the pleas in all three cases had been made voluntarily and with full understanding by the defendant. Defendant also signed and swore to a written transcript of the pleas. The trial judge thereupon adjudged that defendant's pleas of guilty were freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. The judge ordered the transcript of the pleas and his adjudication to be filed and recorded, and ordered the pleas of guilty to be entered in the record.

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The three cases were consolidated for purposes of judgment, and judgment was entered sentencing defendant to prison for a term of not less than four nor more than five years. From this judgment, defendant appealed.

*Attorney General Robert Morgan by Assistant Attorney General Eugene Hafer for the State.*

*Assistant Public Defender D. Lamar Dowda for defendant appellant.*

PARKER, Judge.

[1] Since defendant pleaded guilty, this appeal presents for review only the question whether error appears on the face of the record proper. *State v. Roberts*, 279 N.C. 500, 183 S.E. 2d 647. None does, and defendant's counsel so concedes.

[2, 3] The brief of the Attorney General points out that the first count in the bill of indictment in Case No. 71CR38916, which charged the offense of felonious larceny, was defective in that it failed to allege the name of the owner of the property stolen, citing *State v. McKoy*, 265 N.C. 380, 144 S.E. 2d 46. This defect, however, is immaterial, since defendant did not plead guilty and no judgment was imposed with respect to the offense charged in the first count of that bill. In that case he pleaded guilty only to the offense charged in the second count of the bill, receiving stolen property knowing the same to have been stolen. In a prosecution for receiving stolen goods, it is not essential that the indictment state the names of those from whom the goods were stolen. *State v. Brady*, 237 N.C. 675, 75 S.E. 2d 791.

We have carefully examined the entire record and find

No error.

Chief Judge MALLARD and Judge MORRIS concur.

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State v. Guy

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STATE OF NORTH CAROLINA v. HARRY GUY

No. 7222SC143

(Filed 23 February 1972)

**Narcotics § 2— sale of amphetamines — indictment — failure to allege possession for purpose of sale**

Bills of indictment charging defendant with the felony of selling amphetamine capsules in August and September of 1969 were not fatally defective in failing to allege that defendant possessed the capsules for the purpose of sale, since the 1969 amendment to G.S. 90-113.2(5), in effect when defendant allegedly made the sales, made it unlawful "to sell or to possess for the purpose of sale" stimulant drugs.

APPEAL from *Collier, Judge*, 12 July 1971 Session of Superior Court, DAVIDSON County.

Defendant was charged with three counts of the felony of selling amphetamine capsules. The indictments were identical in form and substance with the exception of the dates of the alleged offense and the names of the persons to whom sold. The quoting of one, therefore, will suffice.

"The Jurors for the State upon their oath present, That HARRY GUY late of the County of Davidson, on the 28th day of August in the year of our Lord one thousand nine hundred and sixty-nine, with force and arms, at and in the County aforesaid, did unlawfully, wilfully and feloniously sell to one Henry L. Poole the stimulant drug, to wit: twelve (12) #20 capsules of amphetamine in violation of Chapter 90-113.2(5) of the General Statutes of North Carolina against the form of the statute in such case made and provided and against the peace and dignity of the State."

Counsel was appointed for defendant to represent him at trial. Defendant entered a plea of nolo contendere on each charge. The transcript of his plea and the adjudication thereon appear in the record. Judgment was entered adjudging that defendant be imprisoned for "the term of indeterminate sentence of 30 days to 3 years in the State Prison." Defendant gave notice of appeal from the judgment entered. Upon a finding of indigency, counsel was appointed to prosecute his appeal. Counsel on appeal is not the same counsel appearing at trial.

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*State v. Guy*

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*Attorney General Morgan, by Assistant Attorney General Weathers, for the State.*

*Robert L. Grubb for defendant appellant.*

MORRIS, Judge.

Defendant brings forward only one assignment of error. He contends the court committed reversible error in signing the judgment and commitment for the reason that the bills of indictment did not charge an offense because they failed to charge that defendant possessed the capsules for the purpose of sale. This the defendant contends is an essential element of G.S. 90-113.2(5). It is true that none of the bills alleged possession, and that prior to 1969, G.S. 90-113.2(5) provided:

“It shall be unlawful for any person to possess for the purpose of sale, barter, exchange, dispensing, supplying, giving away, or furnishing any barbiturate or stimulant drugs; . . . ”

However, the General Assembly of 1969 amended G.S. 90-113.2(5) so that, effective 23 June 1969, it read: “It shall be unlawful for any person *to sell or* to possess for the purpose of sale, . . . ” (Emphasis supplied.) The offenses with which defendant was charged occurred on 28 August 1969, 3 September 1969, and 10 September 1969—all after the effective date of the 1969 amendment.

The General Assembly of 1971 rewrote Articles 5 and 5A of Chapter 90 of the General Statutes. The present Article 5, the North Carolina Controlled Substances Act, consisting of §§ 90-86 to 90-113.8, replaces former §§ 90-86 to 90-113.13 which included the Narcotic Drug Act (Article 5) and Barbiturate and Stimulant Drugs (Article 5A). Amphetamine is now a Schedule III controlled substance (G.S. 90-91). G.S. 90-95(a) (1) makes its distribution or possession with intent to distribute unlawful and G.S. 90-95(b) provides that the violation of G.S. 90-95(a) (1) shall constitute a felony and prescribes the penalty for violation as imprisonment for not more than five years or a fine of not more than \$5,000, or both in the discretion of the court. The statute under which defendant was convicted was repealed in 1971. However in doing so the General Assembly provided that:

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Insurance Co. v. Bottling Co.

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"G.S. 90-113.7. *Pending proceedings.*—(a) Prosecutions for any violation of law occurring prior to January 1, 1972 shall not be affected by these repealers, or amendments, or abated by reason, thereof."

The punishment imposed by the trial court did not exceed that which is now permissible under G.S. 90-95(b). Defendant's assignment of error is without merit and is overruled.

Defendant also filed in this Court a motion in arrest of judgment, basing his motion on the same ground. For the same reason, the motion is denied.

We note from the record that trial counsel became ill and could not perfect defendant's appeal. It is apparent from the record, however, that trial counsel interposed numerous objections to evidence submitted by the State and interposed various motions. Because of the rather unusual circumstances, and in view of defendant's indigency, we have carefully examined the record and find the proceeding in the Superior Court free from prejudicial error.

No error.

Chief Judge MALLARD and Judge PARKER concur.

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THE AMERICAN MUTUAL FIRE INSURANCE COMPANY, THE  
NORFOLK AND DEDHAM INSURANCE COMPANY, AND THE  
PENNSYLVANIA MUTUAL FIRE INSURANCE COMPANY v.  
THE COCA-COLA BOTTLING COMPANY OF HIGH POINT

No. 7218SC10

(Filed 23 February 1972)

**Insurance § 135— fire insurance —insurer's action against tortfeasor —  
contributory negligence of insured**

In an action brought by fire insurers to recover the amount of a claim paid to insured for damages from a fire which allegedly started because of defective wiring in a Coca-Cola fountain dispensing machine owned by defendant and located in insured's store, the evidence was sufficient for submission to the jury of an issue as to the insured's contributory negligence where it tended to show that after the machine was installed in the store, the insured moved it to a new location, placed a half-screen over the dispensing unit, and placed a screen in front of the mechanical part of the unit, that insured never cleaned the unit

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or the area behind it, and that insured kept highly inflammable styro-foam cups and wax cups above the machine, which cups were destroyed or in a melted condition when firemen arrived on the scene.

APPEAL by plaintiffs from *Kivett, Judge*, 29 March 1971 Session of GUILFORD Superior Court.

Plaintiffs, three insurance companies, brought this action as subrogees after paying a fire insurance claim to their insured, Bill Cain, trading as The Men's Den, a clothing store in High Point. Plaintiffs allege: The fire occurred as a result of an electric cord to a Coca-Cola fountain dispensing machine short-circuited due to defective insulation. The machine was owned by defendant at the time of the fire. The agents of defendant had exclusive control of the machine in regard to refilling, repairing, servicing and maintaining the machine. The negligence of defendant occurred in installing and maintaining the machine with defective wiring which caused the machine to be inherently dangerous.

Defendant denies any negligence as to installing and maintaining a machine with defective wiring. As an affirmative defense defendant alleges contributory negligence of the management of The Men's Den.

The case was submitted to the jury who returned a verdict finding that plaintiffs' insured was damaged as a result of the negligence of defendant, but also finding that plaintiffs' insured by his own negligence contributed to his damage. Plaintiffs appeal from the judgment entered on the verdict.

*Bencini, Wyatt, Early & Harris by A. Doyle Early, Jr., for plaintiff appellants.*

*Sapp and Sapp by Armistead W. Sapp, Jr., for defendant appellee.*

BRITT, Judge.

Plaintiffs first assign as error the submission of the issue of contributory negligence to the jury, having moved for a directed verdict at the close of the evidence which was denied. They allege there was insufficient evidence to justify a submission of such issue. We do not agree with this contention. The record indicates that the management and personnel of The

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Hill v. Hill

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Men's Den exercised such control and dominion over the machine as to raise the issue of contributory negligence in the minds of men of ordinary reason. After the machine was placed in the store by defendant, during a renovation of the store the insured moved the machine to a new location in the store; insured had a barrel cut in half and placed a half-barrel over the fountain dispensing unit to give the effect of the drink coming out of the barrel; insured had a screen placed in front of the mechanical part of the unit to conceal the unsightly parts of the unit; neither the unit nor the area behind it was ever cleaned; insured caused the compressor to be placed under a shelf attached to the wall with merchandise above the unit and insured caused highly inflammable styrofoam cups and wax cups to be kept above the machine, which cups were destroyed or in a melted condition when firemen arrived on the scene after the fire. All of these facts when taken in the light most favorable to defendant permit the inference of contributory negligence. When this inference may be drawn by men of ordinary reason the issue is properly submitted to the jury. *Taylor v. Carter*, 2 N.C. App. 78, 162 S.E. 2d 607 (1968).

Plaintiffs' second assignment of error is that if an issue of contributory negligence were properly submitted to the jury, then the charge of the court in regard to that issue was erroneous and prejudicial. We find no merit in this contention. Upon a careful review of the jury charge, we find it to be free from prejudicial error.

No error.

Judges CAMPBELL and GRAHAM concur.

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HARRIETTE H. HILL v. JAMES C. HILL

No. 7225DC37

(Filed 23 February 1972)

**1. Appeal and Error § 41— record on appeal — duty of appellant**

It is the duty of appellant to see that the record is properly made up and transmitted.

**2. Appeal and Error § 41— insufficiency of the record**

The appellate court is unable to pass upon the questions raised by appellant in this appeal from an award of child support and coun-

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Hill v. Hill

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sel fees *pendente lite*, where the record on appeal does not contain a complete record of the testimony presented at the hearing and does not contain the text of a separation agreement referred to in the pleadings and the order appealed from.

APPEAL by plaintiff from *Sigmon*, District Judge, 24 May 1971 Session of CATAWBA District Court.

Plaintiff instituted this action on 2 March 1971 asking for temporary and permanent alimony, subsistence for the minor child of the parties and counsel fees. She alleged adultery on the part of defendant. Defendant filed answer admitting the marriage and alleging a voluntary separation of the parties in December of 1968. He further pled a separation agreement entered into on 12 April 1969 and a breach of said agreement by plaintiff. He also alleged adultery on the part of plaintiff.

Pursuant to notice and a hearing on plaintiff's motion for alimony *pendente lite*, child support and counsel fees, the court entered an order making certain findings of fact and conclusions of law and requiring defendant to pay certain sums for the support of the child and counsel fees. The court declined to allow plaintiff any alimony *pendente lite*.

Plaintiff appealed from the order.

*Gene H. Kendall*, attorney for plaintiff-appellant.

*Sigmon & Clark* by *E. Fielding Clark II*, attorney for defendant-appellee.

BRITT, Judge.

Plaintiff assigns as error certain findings of fact and conclusions of law made by the trial judge. The case on appeal does not contain a complete record of the testimony presented at the hearing and does not contain the text of the separation agreement referred to in the pleadings and the order appealed from.

[1, 2] It is the duty of an appellant to see that the record is properly made up and transmitted. *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453 (1966). In the case at hand, without a more complete record of the evidence presented at the hearing, including in particular the separation agreement, we are unable to pass upon the questions raised by plaintiff-appellant. One of the conclusions of law that plaintiff assigns as error is as fol-

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lows: "That adultery will not give rise to a cause of action under North Carolina General Statute Section 50-16.1 through 10, where said acts of adultery occur at a time when the accused party is living under a valid, and properly executed Separation Agreement." We can conceive of cases in which this conclusion would be erroneous but from the record before us we are unable to say whether or not it was erroneous in this case.

The order appealed from is interlocutory. Plaintiff is entitled to a trial of her cause on the merits at which time she will have another opportunity to have a proper record of the case made and proper foundation laid for all questions she desires to raise.

For lack of a proper record on appeal, the order appealed from is

Affirmed.

Judges BROCK and VAUGHN concur.

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GERALDEAN CAGLE McDOWELL v. GLENN EXTON McDOWELL

No. 7219DC85

(Filed 23 February 1972)

**Divorce and Alimony § 19— modification of award of temporary subsistence  
— failure to show changed circumstances**

The trial court erred in modifying an award of temporary subsistence and child custody where movant failed to show a change in circumstances of the parties since the entry of the prior order. G.S. 15-16.9(a).

APPEAL by defendant from *Hammond*, District Judge, 10 September 1971 Session of RANDOLPH County District Court.

In this action instituted on 23 September 1970, plaintiff asks for temporary and permanent alimony, custody of the children of the parties, possession of the home and furnishings, possession of an automobile and counsel fees. On 2 March 1971, pursuant to proper notice and a hearing, District Judge Hammond entered an order granting plaintiff temporary subsistence for herself and her children, custody of the children with certain

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visitation rights in defendant, and counsel fees. On 20 August 1971, plaintiff filed motion referring to the order of 2 March 1971 but asking the court to enter an order giving her possession of certain specified items of household furniture, furnishings and appliances located in the residence formally occupied by the parties. Pursuant to notice, Judge Hammond conducted a hearing and on 10 September 1971 entered an order reaffirming many of the findings and conclusions set forth in his 2 March 1971 order and granting plaintiff possession of part of the items of furniture, furnishings and appliances requested.

Defendant appeals from the 10 September 1971 order.

*No counsel for plaintiff-appellee.*

*Ottway Burton, attorney for defendant-appellant.*

BRITT, Judge.

Defendant contends that the order appealed from was improper for the reason that plaintiff did not allege and show any change of conditions subsequent to the entry of the 2 March 1971 order. In her testimony at the second hearing, plaintiff testified that there had been no change in the conditions of the parties since the entry of the previous order and the trial judge made no finding of any change of conditions.

G.S. 50-16.9 (a) entitled "Modification of order" provides in pertinent part as follows: "An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested."

In *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E. 2d 506 (1969), this court said: "It is well established that a change in circumstances must be shown in order to modify an order relating to custody, support or alimony. G.S. 50-13.7; G.S. 50-16.9; *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 102 S.E. 2d 469; *Rayfield v. Rayfield*, 242 N.C. 691, 89 S.E. 2d 399; *Barber v. Barber*, 216 N.C. 232, 4 S.E. 2d 447; 2 Lee, N.C. Family Law, § 153, pp. 227, 228."

Upon a motion for modification of an award of alimony and support pendente lite, the movant has the burden of showing a

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change of circumstances. *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E. 2d 144 (1971). For failure of movant to show a change of circumstances in this case, the order appealed from was improper and is vacated.

Reversed.

Judges CAMPBELL and GRAHAM concur.

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FRANCES W. KEYES v. HARDIN OIL CO., INC.

No. 7218DC174

(Filed 23 February 1972)

**1. Appeal and Error § 39— failure to docket record in apt time**

Appeal is dismissed for failure to docket the record on appeal within 90 days after the date of the judgment appealed from, no order extending the time for docketing the record having been entered by the trial court. Court of Appeals Rule 5.

**2. Appeal and Error § 39— extension of time to docket appeal—order extending time to serve case on appeal**

An order extending the time “within which to prepare the statement of case on appeal or record on appeal” did not extend the time for docketing the record on appeal.

**3. Appeal and Error § 36— service of case on appeal— extension of time— trial judge**

Only the judge who tried the case has authority to sign an order extending the time for service of the case on appeal.

APPEAL by defendant from *Kuykendall*, Chief District Judge, August 1971 Civil Session of District Court held in GUILFORD County.

Civil action to recover damages for breach of an implied warranty of fitness of a travel trailer. The jury answered issues in favor of the plaintiff, and from judgment on the verdict, defendant appealed.

*Parker, Mazzoli & Rice* by Gerald C. Parker for plaintiff appellee.

*Walker, Short & Alexander* by Perry N. Walker for defendant appellant.

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PARKER, Judge.

[1] The judgment appealed from was dated 21 August 1971. The record on appeal was not docketed in this Court until 28 December 1971, which was more than ninety days after the date of the judgment appealed from. No order extending the time for docketing the record on appeal appears in the record. For failure of appellant to docket the record on appeal within the time allowed by the rules of this Court, this appeal is dismissed. Rule 5, Rules of Practice in the Court of Appeals. *Phillips v. Wrenn Brothers*, 12 N.C. App. 35, 182 S.E. 2d 285; *State v. Burgess*, 11 N.C. App. 430, 181 S.E. 2d 120; *Williford v. Williford*, 10 N.C. App. 541, 179 S.E. 2d 118; *State v. Squires*, 1 N.C. App. 199, 160 S.E. 2d 550.

The record does contain an order, signed by District Judge Alexander, extending the time "within which to prepare the statement of case on appeal or record on appeal." This order did not extend the time for *docketing* the record on appeal. *Horton v. Davis*, 11 N.C. 592, 181 S.E. 2d 781; *Smith v. Starnes*, 1 N.C. App. 192, 160 S.E. 2d 547. In addition, we call attention to the fact that Judge Alexander, who was not the trial judge, did not have authority to sign an order extending the time for service of the case on appeal. *State v. Lewis*, 9 N.C. App. 323, 176 S.E. 2d 1; *State v. Shoemaker*, 9 N.C. App. 273, 175 S.E. 2d 781.

Nevertheless, we have carefully reviewed the record and prejudicial error sufficient to warrant a new trial is not shown.

Appeal dismissed.

Chief Judge MALLARD and Judge MORRIS concur.

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Gardner v. Brady

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JAMES H. GARDNER AND WIFE, BLANCHE A. GARDNER v. MARY  
GARDNER BRADY AND HOWARD T. GARDNER

## INCORRECTLY CAPTIONED

"IN RE: FORECLOSURE OF DEED OF TRUST FROM HOWARD T. GARDNER  
(SINGLE) RECORDED IN BOOK 881, PAGE 343, IN THE RANDOLPH COUNTY  
REGISTRY"

No. 7219SC158

(Filed 23 February 1972)

**Appeal and Error § 6— appeal from interlocutory orders — motion to strike  
portions of answer — appointment of guardian ad litem**

No appeal lies from interlocutory orders allowing petitioners' motion to strike portions of one respondent's answer and further answer and affirming the clerk's appointment of a guardian ad litem for another respondent.

APPEAL by respondent, Mary Gardner Brady, from *Johnston, Judge*, 20 September 1971 Session of Superior Court held in RANDOLPH County.

This proceeding was brought to determine ownership and obtain distribution of certain funds on deposit with the clerk of superior court. The funds in question resulted from foreclosure of a deed of trust on real property, and represent the balance remaining after payment in full of the secured indebtedness and all costs of foreclosure. Respondent, Mary Gardner Brady, appealed from two orders entered by the judge of superior court, one of which allowed petitioners' motion to strike certain portions of the appealing respondent's answer and further answer, and the other of which affirmed an order of the clerk which appointed a guardian ad litem for the respondent, Howard T. Gardner.

*Miller, Beck & O'Briant by Adam W. Beck for petitioner appellees.*

*Ottway Burton for respondent appellant, Mary Gardner Brady.*

PARKER, Judge.

Rule 4 of the Rules of Practice in the Court of Appeals of North Carolina, as the same has been in effect since it was prescribed and adopted by the Supreme Court on 20 January 1971, is as follows:

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"4. The Court of Appeals will not entertain an appeal:

From the ruling on an interlocutory motion, unless provided for elsewhere. Any interested party may enter an exception to the ruling on the motion and present the question thus raised to this Court on the final appeal; provided, that when any interested party conceives that he will suffer substantial harm from the ruling on the motion, unless the ruling is reviewed by this Court prior to the trial of the cause on its merits, he may petition this Court for a writ of certiorari within thirty days from the date of the entry of the order ruling on the motion."

Each of the orders here appealed from was a ruling by the judge of superior court on an interlocutory motion. No petition for writ of certiorari was filed. Under Rule 4, the appeal is

Dismissed.

Chief Judge MALLARD and Judge MORRIS concur.

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KATHLEEN HEMRIC CARTER v. THOMAS WARD CARTER

No. 7223DC151

(Filed 23 February 1972)

1. Appeal and Error § 41— failure of record to show dates of pleadings, etc.

An appeal is subject to dismissal where the filing dates of the pleadings, motions, orders and judgment are not shown in the record on appeal. Court of Appeals Rule 48.

2. Divorce and Alimony § 23— refusal to change child support payments

No prejudicial error or abuse of discretion has been shown in the court's order refusing to either increase or decrease the amount of the payments for support of the children of the parties.

APPEAL by defendant from *Davis, District Judge*, 7 September 1971 Session of District Court held in WILKES County.

Plaintiff and defendant were married to each other on 18 September 1948 and lived together as man and wife until their separation on or about 23 February 1971. Two children were born of the marriage, and they are in the care and custody of plaintiff. Defendant is paying \$30.00 per week for the support of the two children.

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Carter v. Carter

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On or about 22 August 1971, defendant filed a motion in the cause alleging that the weekly support payments of \$30.00 were excessive and asking that the amount thereof be reduced. Plaintiff filed a reply alleging that the weekly support payments of \$30.00 were insufficient and asking that the amount thereof be increased. The matter was heard by Judge Davis on 7 September 1971. His order provided that no increase or decrease should be made in the weekly payments of \$30.00 for the support of the two children and further provided for payment of attorney fees to counsel for plaintiff.

Defendant appealed.

*Franklin Smith for appellant.*

*No appearance contra.*

BROCK, Judge.

[1] The filing dates of the various pleadings, motions, orders, and judgment are not shown in the record on appeal. Therefore, we are unable to tell with certainty when any of the actions took place, or in what order they occurred. Our rules, as adopted in 1967, are designed to prevent confusion created by not knowing when pleadings and orders are filled and actions taken. Rule 19(a), Rules of Practice in the Court of Appeals, provides in part as follows: "Every pleading, motion, affidavit, or other document included in the record on appeal shall plainly show the date on which it was filed and, if verified, the date of the verification and the name of the person who verified it. Every order, judgment, decree and determination shall show the date on which it was signed and the date on which it was filed." A failure to comply with the rules of practice in this court subjects the appeal to dismissal. Rule 48.

[2] Nevertheless, we have carefully reviewed the record, and, although some of the findings in the order appealed from seem to be immaterial upon the question of child support (G.S. 50-13.4), we feel that Judge Davis has adequately ruled upon the controversy. No prejudicial error or abuse of discretion has been shown.

The order appealed from is

Affirmed.

Judges HEDRICK and VAUGHN concur.

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Woods v. Enterprises, Inc.

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CLEMENT LEE WOODS, ADMINISTRATOR OF THE ESTATE OF RANDY LEE WOODS v. JAMES ENTERPRISES, INC., JAMES FARMS, INC. AND HOWARD STAMEY

No. 7222SC20

(Filed 23 February 1972)

Appeal and Error § 6—interlocutory order—striking of portions of complaint

Order allowing defendants' motions to strike portions of the complaint is not appealable. Court of Appeals Rule 4.

APPEAL by plaintiff from *Crissman, Judge*, 21 June 1971 Session, IREDELL Superior Court.

*Franklin Smith for plaintiff appellant.*

*Collier, Harris & Homesley and Craighill, Rendleman & Clarkson by J. B. Craighill for defendant appellees.*

BRITT, Judge.

Plaintiff attempts to appeal from an order allowing defendants' motions to strike certain portions of plaintiff's complaint. The order is not appealable. Rule 4, Rules of Practice in the Court of Appeals of North Carolina. Plaintiff has also petitioned this court for a writ of certiorari as provided by Rule 4 to review said order but we do not agree with plaintiff's contention that he will suffer substantial harm from the ruling on the motion unless the ruling is reviewed by this court prior to the trial of the cause on its merits. The petition is denied.

Appeal dismissed.

Petition for certiorari denied.

Judges CAMPBELL and GRAHAM concur.

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State v. Oakley

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STATE OF NORTH CAROLINA v. DAVID JOSEPH OAKLEY

No. 7219SC190

(Filed 23 February 1972)

APPEAL by defendant from *Blount, Special Judge*, 18 October 1971 Session of CABARRUS Superior Court.

Defendant appeals from an order revoking his probation. Following a hearing, the court found the following facts: At the 8 January 1969 Session of Cabarrus Superior Court, defendant entered pleas of guilty to the offenses of leaving the scene of an accident, operating a motor vehicle without a valid license, and driving on the wrong side of the highway. Pursuant to the pleas, defendant was given a prison sentence of two years suspended on condition that defendant be placed on probation for a period of three years. On 2 November 1970, defendant committed the offense of operating a motor vehicle on a public highway without a valid operator's license. On 23 November 1970, and on 27 September 1971, defendant committed the offense of public drunkenness. The commission of said offenses was in violation of the terms of defendant's probation.

Pursuant to said findings, the court revoked defendant's probation and ordered that commitment issue for the two years prison sentence.

*Attorney General Robert Morgan by Andrew A. Vanore, Jr., Deputy Attorney General, for the State.*

*Wesley B. Grant for defendant appellant.*

BRITT, Judge.

Defendant's court appointed counsel with commendable candor states that he has carefully examined the record in this case and can find no error, but asks this court to review the same. That we have done but find no reason to disturb the order appealed from.

Affirmed.

Judges CAMPBELL and GRAHAM concur.

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Price v. Bunn

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DORIS JEANS PRICE v. W. B. BUNN AND WIFE, ADDIE Y. BUNN,  
AND BUNN LAKE ESTATES, INC.

No. 7210SC258

(Filed 29 March 1972)

**1. Easements § 8— construction of easement deed — consideration of matters outside deed**

Where the language of an easement deed was plain and unambiguous, construction of the deed was a matter of law for the court, and evidence of facts and circumstances existing when the deed was executed could not be considered in such construction.

**2. Easements § 8— easement deed — contract**

An easement deed is a contract.

**3. Deeds § 15; Easements § 8— determinable easement — reversion to grantor**

A determinable easement was granted by a deed conveying an easement to back water upon the grantor's lands "forever or so long as" the grantee, his heirs or assigns use the easement, and providing that in the event the grantee "should fail to keep up and maintain the dam across Moccasin Creek, and should fail to use the rights and privileges . . . for a period of five years, the terms of this easement shall become null and void and of no effect, and the property and rights herein given, granted and conveyed shall revert to" the grantor; upon failure of the grantee or his successors in title to exercise the rights granted by the easement deed within five years after the easement was created, the easement automatically terminated and the interests and rights created thereby reverted to the grantor as a matter of law.

**4. Easements § 8; Equity § 1— determinable easement — reversion to grantor — relief in equity**

Where defendants breached a condition of a determinable easement to back up waters on plaintiff's land by rebuilding a dam when they failed to rebuild the dam or use the easement within five years after the easement was granted, equity will not relieve against a reversion of the easement to plaintiff upon the ground that much expense has been incurred in acquiring and clearing land and in rebuilding the dam after the time specified in the easement, that other owners of property adjoining the lake created by the dam have built houses along the high water mark of the lake, and that plaintiff has only six acres under water.

**5. Deeds § 15; Easements § 8— easement on condition subsequent — re-entry**

Where an easement is granted on condition subsequent, no act of re-entry by the grantor is necessary upon breach of the condition where the grantor retains possession of the land affected by the easement.

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Price v. Bunn

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APPEAL by defendants from *Braswell, Judge*, 18 October 1971 Civil Session of Superior Court held in WAKE County.

The facts are as follows: Both the plaintiff and defendant Bunn Lake Estates, Inc., own land situated on Moccasin Creek in Wake and Franklin Counties, the plaintiff's land being north of and upstream from that of the defendant. The corporate defendant acquired title to the tract of land on Moccasin Creek known as "Strickland's Old Mill Tract" from the defendants W. B. Bunn and wife, Addie Y. Bunn, by deed dated 8 May 1967. The defendants Bunn had acquired title to this tract from one J. K. Barrow and wife by deed dated 17 April 1951.

Prior to 17 April 1951, an old "washed-out" dam had been located on the defendants' tract of land. During the summer of 1951, defendants began "to make preparations for rebuilding the dam across Moccasin Creek and began to and did clean up and cut out wood and timber" on the Strickland's Old Mill Tract; however, it was not until 1966 that the defendants actually rebuilt the dam, which they have maintained until the present. In November or December of 1966, the water impounded by this dam first backed onto approximately six acres of the plaintiff's land.

The plaintiff, in her complaint filed 3 August 1970, set forth in substance the foregoing facts and alleged:

"10) That as a result of defendants' aforesaid unauthorized and wrongful acts and the resultant encroachment and invasion of water onto plaintiff's land, and interference with the natural water flow, plaintiff has been injured in the amount of \$12,000.00, and is entitled to recover said amount as damages for injuries so suffered to the time of filing this action."

In their answer and answers to interrogatories, the defendants relied upon a deed of easement to J. K. Barrow, defendants' predecessor in title, by H. P. Jeans and wife, plaintiff's predecessors in title, dated 28 December 1945, granting to Barrow, "his heirs and assigns," the "perpetual right and easement to back water upon and over the lands" of the Jeans. The pertinent portions of this easement (which was attached to defendants' Answer to Interrogatories as Exhibit A) read as follows:

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Price v. Bunn

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"NORTH CAROLINA  
WAKE COUNTY

THIS EASEMENT, made this 28th day of Dec., 1945, by H. P. Jeans and wife, Lessie Jeans, of Franklin County, North Carolina, parties of the first part to J. K. Barrow of Wake County and State of North Carolina, party of the second part.

WITNESSETH:

THAT WHEREAS, the parties of the first part are the owners in fee simple of a certain tract of land located in Wake and Franklin Counties, North Carolina, containing 51.7 acres, more or less, . . .

WHEREAS, the party of the second part owns a tract of land on both sides of Moccasin Creek known as Strickland's Old Mill and practically South of the parties of the first parts' lands and in the direction of the flow of the water in Moccasin Creek; and

WHEREAS, the party of the second part, contemplates rebuilding the dam on his land across said creek for the purpose of creating a pond for fishing, boating, and other purposes; and whereas, when said dam is built it will back water upon the lands of the parties of the first part; and whereas the parties of the first part, have for the consideration hereinafter stated, agreed to grant unto the party of the second part, the right, privilege, and easement of so backing water upon their said lands and with other rights and privileges as hereinafter set out.

NOW THEREFORE, in consideration of the sum of Ten Dollars, to the parties of the first part, in hand paid by the party of the second part, the receipt of which is hereby acknowledged, the said parties of the first part, have given, granted, and conveyed, and do hereby give, grant, and convey to the said party of the second part, his heirs and assigns, the perpetual right and easement to back water upon and over the lands of the parties of the first part along and on both sides of said Moccasin Creek . . . together with the exclusive right in the party of the second part, his heirs and assigns to exercise full control and possession of the area so covered by water for purposes of

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Price v. Bunn

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fishing, boating, and other purposes incidental thereto including the right to cut and dig up and otherwise clear and remove trees and underbrush and other obstructions within the area covered or to be covered by water, and to clear underbrush at points along the edge of said backed up water and to use points on edge thereof for landing of boats and other purposes incidental to fishing and boating.

\* \* \*

TO HAVE AND TO HOLD, said perpetual right and easement with full possession and control, to the party of the second part, his heirs and assigns forever, or so long as the said party of the second part, his heirs and assigns, may or will use the above rights, privileges and easement, but in the event the party of the second part, his heirs and assigns should fail to keep up and maintain the dam across Moccasin Creek, and should fail to use the rights and privileges of said property described in this easement for the period of five years, the terms of this easement shall become null and void and of no effect, and the property and rights herein given, granted, and conveyed, shall revert to the parties of the first part, their heirs and assigns. It is expressly agreed that the rights and easement herein granted is appurtenant to and runs with the land now owned by the party of the second part, as herein provided."

On 17 September 1971, plaintiff filed a "motion for Summary Judgment for Plaintiff and Notice of Hearing." A hearing on this motion was held by Judge Braswell at the Civil Session of Superior Court for Wake County beginning 18 October 1971, and the following facts, among others, were found:

"7) Defendants' asserted right to impound water over and upon the lands of plaintiff is predicated solely upon an instrument, dated, executed and acknowledged on December 28, 1945, from H. P. Jeans and wife, Lessie Jeans, to J. K. Barrow, recorded on June 8, 1951, in Book 1075, Page 358, Wake County Registry, copy of which is attached as Exhibit A to defendants' Answer to Interrogatories.

8) The language, terms and conditions of the instrument, hereinabove referred to in paragraph 7 of these findings of facts, are plain and unambiguous; and, when read and interpreted in its entirety, said instrument is construed

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Price v. Bunn

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by the Court as requiring the exercise of the rights and privileges, therein granted, during the five-year period beginning December 28, 1945; and that, upon a failure of said rights and privileges to be so utilized within said five-year period, the terms of said instrument would become null and void and of no effect and all such rights so granted would terminate and revert to the grantors therein, their heirs and assigns.

9) That the rights granted by aforesaid instrument were not exercised and utilized during said five-year period, beginning December 28, 1945, and that the terms of said instrument became null and void and of no effect and all rights and privileges granted and conveyed by said instrument reverted to the grantors therein and their heirs and assigns.

10) Defendants have established no right or privilege to divert and impound water upon the lands of plaintiff, and that such backing and impounding of water by defendants in and upon the lands of plaintiff is wrongful and constitutes a trespass and encroachment upon plaintiff's said land.

11) Plaintiff is entitled to damages for said trespass and encroachment by defendants in such amount as may be determined by a jury upon further hearing of this matter.

12) Plaintiff's right to the relief prayed in her complaint is not barred by the statute of limitations, but her injury is limited to such damages as she has suffered during the period beginning three years next preceding the filing of this action on August 3, 1970.

13) Upon the pleadings and evidence before the Court, laches does not arise as a bar to the relief prayed by plaintiff in her complaint."

Upon these and other findings, Judge Braswell concluded as a matter of law:

"1) Defendants have and are continuing to trespass and encroach in and upon the real property of plaintiff by the wrongful and improper ponding and diverting of waters upon plaintiff's said land.

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Price v. Bunn

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2) Plaintiff is entitled to recover of defendants such damages for the wrongful encroachment and trespass to her real property as she has suffered during the period beginning three years next preceding the filing of this action on August 3, 1970, said damages to be determined by a jury upon further hearing of this matter.

3) Plaintiff is entitled to an order for the removal and abatement of said trespass and encroachment, caused by such ponding of waters, from any and all portions of plaintiff's said property; and is entitled to a permanent injunction prohibiting any such future encroachment and invasion onto her said property by defendants or interference by defendants with the natural flow of said Moccasin Creek through plaintiff's said lands.

4) There is no genuine issue as to any material fact, and plaintiff is entitled, as a matter of law, to judgment for the relief prayed."

Based upon the findings of fact and conclusions of law, Judge Braswell directed the defendants to remove any and all encroachments on the lands of plaintiff, permanently enjoined them from backing, diverting or ponding any water on the lands of plaintiff, described the lands owned by plaintiff, and restrained defendants from interfering with the natural flow of Moccasin Creek through plaintiff's lands.

To the findings of fact and conclusions of law as set forth in the foregoing judgment and to the signing and entering of the judgment, the defendants appealed to the Court of Appeals.

*Emanuel and Thompson by W. Hugh Thompson for plaintiff appellee.*

*Yarborough, Blanchard, Tucker & Denson by Hill Yarborough for defendant appellants.*

MALLARD, Chief Judge.

The first question presented by defendants in this appeal is: "Did the Court err in excluding evidence as to the subject matter, the setting of the parties, the surrounding and attendant circumstances, the object the parties had in view, and the light which the parties possessed when the Easement was

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made?" This excluded evidence consisted primarily of certain portions of an affidavit made by defendant W. B. Bunn and portions of certain special proceedings and deeds concerning lands situated on both sides of Moccasin Creek and subsequently affected by the dam rebuilt by defendants. Defendants contend that this various evidence was offered "for the purpose of showing that defendants at the first reasonable opportunity acquired those lands on Moccasin Creek which lay downstream from plaintiff's land and upstream from defendants' land (that is, between plaintiff's land and defendants' land)" and "of showing the light the parties to the easement possessed when the easement was first prepared and was later executed." We hold that it was not error for the trial judge to exclude this evidence.

[1, 2] We concur in the judge's findings that the language of the easement is "plain and unambiguous" and hold that, for that reason, reference to matters outside of the deed of easement itself is not required for a correct construction. An easement deed is a contract. *Weyerhaeuser v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962).

"It is elementary that where a contract is plain and unambiguous the construction of the agreement is a matter of law for the court. 2 Strong, N. C. Index 2d, Contracts, § 12, p. 311. In the case of *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539, it is stated: 'When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit. *Indemnity Co. v. Hood*, 226 N.C. 706, 710, 40 S.E. 2d 198. It is the province of the courts to construe and not to make contracts for the parties. *Williamson v. Miller*, 231 N.C. 722, 727, 58 S.E. 2d 743; *Green v. Insurance Co.*, 233 N.C. 321, 327, 64 S.E. 2d 162. The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense. *Bailey v. Insurance Co.*, 222 N.C. 716, 722, 24 S.E. 2d 614.'" *Peaseley v. Coke Co.*, 12 N.C. App. 226, 182 S.E. 2d 810 (1971).

Considering the deed or easement in its entirety, we think that the intent of the parties and the meaning of the language they employed are sufficiently clear. The easement provides that the

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Price v. Bunn

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party of the second part, (defendants' grantor) is to have the easement granted forever, "or *so long as*" he "may or will use the above rights, privileges and easement, but in the event . . . (he) *should fail to keep up* and maintain the dam across Moccasin Creek, and *should fail to use the rights and privileges . . . for the period of five years*, the terms of this easement shall become null and void and of no effect, and the property and rights herein given, granted and conveyed shall revert to the parties of the first part, their heirs and assigns. \* \* \* " (Emphasis added.)

[3] This language states that J. K. Barrow, his heirs or assigns, had a five-year period within which to exercise the rights and privileges given by the deed. The language employed in connection with this easement is that which would be appropriate for the creation of a fee simple determinable estate. "The estate known as the fee simple determinable is created when apt and appropriate language is used by a grantor or deviser indicative of an intent on the part of the grantor or deviser that a fee simple estate conveyed or devised will expire *automatically* upon the happening of a certain event or upon the discontinuance of certain existing facts. Typical language creating such estates may specify that the grantee or devisee shall have land 'until' some event occurs, or 'while,' 'during,' or 'for so long as' some state of facts continues to exist. Upon the happening of the specified event, the fee simple determinable automatically terminates, and reverts to the grantor or to his heirs. \* \* \* When the specified event occurs, the possessory estate of the grantee or devisee ends by operation of law automatically and without the necessity of any act or re-entry, without the institution of any lawsuit, or the intervention of any court. \* \* \* " (Emphasis original.) Webster, Real Estate Law in North Carolina, § 35, p. 49.

"*Determinable easements* are well recognized, as in *Wallace v. Bellamy*, 199 N.C. 759, 155 S.E. 856, where an easement was granted, to terminate upon the construction of certain streets which would provide for ingress and egress to and from the property conveyed in lieu of the way granted in the easement. Likewise, in *McDowell v. R. Co.*, 144 N.C. 721, 57 S.E. 520, an easement for the construction of a railroad was granted on condition the road was constructed in five years; this was held to be a

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Price v. Bunn

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valid easement, subject to terminate if the condition was not met. Also, in *Hall v. Turner*, 110 N.C. 292, 14 S.E. 791, the easement was to continue so long as grantee maintained a mill at a certain location." *Dees v. Pipeline Co.*, 266 N.C. 323, 146 S.E. 2d 50 (1966). (Emphasis added.)

In the present case, when the five-year period from the date of the creation of the easement elapsed (on or about 27 December 1950) and none of the rights and privileges granted therein; primarily, the right to back water over the plaintiff's land, but including rights and privileges incidental thereto, had been exercised by J. K. Barrow or his successors in title, the easement was automatically terminated and the interests and rights created thereby reverted to the grantor and his successors in title as a matter of law.

Defendants admit that the rights that they have asserted are based upon the easement from Jeans to Barrow, but contend that the intent of the parties is not clear and that "issues as to the facts and circumstances existing at the time the easement was executed" should have been submitted to the jury for determination. We do not find from a review of the record, including that evidence which the hearing judge excluded, that any issues of fact suitable for jury determination were raised other than that of damages. The legal import of the terms of a deed of easement, except where ambiguity obscures the intent of the parties, is a matter of law for determination by the court. *Weyerhaeuser v. Light Co.*, *supra*.

The defendants excepted to nearly all of the findings of fact and conclusions of law of the hearing judge and contend further that the court erred in its "interpretation" of the easement, in allowing the plaintiff's motion for summary judgment and in failing to grant summary judgment for the defendants. Defendants have seized upon the absence of any explicit requirement in the deed of easement requiring that the dam be rebuilt by a stated date and contend that the previously quoted provisions or limitations contained in the *habendum* clause of the deed became operative only *after* the dam was rebuilt, if it ever were rebuilt at all. Stated differently, the defendants contend that J. K. Barrow or his successors in title to the dominant tract had an indefinite period of time within which to rebuild the dam (if, in fact, they ever chose to rebuild it at all) and that until such time the rights and privileges granted by

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the deed were in full force, subject to reverting only if the owners of the dominant tract *thereafter* failed to keep up or maintain the dam for a period of five years or more. We hold that the language of the easement does not admit of such a construction.

[4] In their fourth assignment of error, the defendants contend that the court erred in failing to consider evidence "of special circumstances for equity to consider in that people other than the defendants who owned land adjoining the lake have built houses along the high water mark of the lake . . . and many people have acquired lots adjoining said lake from persons other than the defendants . . . ." Defendants also set out the contention (which is not disputed) that much expense has been incurred in acquiring and clearing land and in building the dam and contend that it is "inequitable" for plaintiff, having only six acres affected by the impoundment, to demand that the project be "discarded."

In *McDowell v. R.R.*, 144 N.C. 721, 57 S.E. 520 (1907), the plaintiff had deeded to the defendant railroad a strip of land for the purpose of building a rail line. Following the *habendum* in the deed was a provision that "if the party of the second part shall fail and neglect for a period of five years from this date to construct its line of railway over the premises hereby granted, then and in that event the title to said lands shall revert to the parties of the first part . . . ." Five years elapsed and the defendant had not constructed its line of railway over the premises.

In *McDowell*, there were considered "equities" similar to those contended for by the defendants in the case before us. The strip of land granted by the plaintiffs was only a small link in the railroad that was being built from the Georgia state line to Franklin, North Carolina. Apparently, one factor in the railroad's failure to construct the rail line on the premises in question within the five-year period was that a 1905 Act of the General Assembly required it to concentrate its work forces on another part of the line. In response to the defendant's contention that it came within "the protective principle of equity jurisprudence, whereby relief is granted against forfeiture," the Court said:

"As we have seen, on 24 May 1906, the estate which had been conveyed by plaintiffs to defendant came to an

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Price v. Bunn

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end and revested in the plaintiffs as if it had never been out of them; in other words, they were in, as of their original estate, by reverter on account of condition broken. Is it within the province, or the power of a court of equity to destroy the estate now in plaintiffs and revest it in the defendant? \* \* \*

\* \* \* Bispham says: 'But equity will not, in general, and in the absence of special circumstances calling for interference, give relief in cases of forfeiture growing out of breach of covenant for repairing, insuring, or doing any specific act.' It will be observed that while in many cases equity will not enforce a forfeiture, the *plaintiff here is not invoking equitable relief; he is standing upon his legal right—his contract*. There is nothing harsh or inequitable in the terms of the contract in the time fixed for constructing the road over his premises. During the five years the value of his land was probably impaired by the burden upon it; he may well have been willing to carry the burden during that time, but no longer; this is what his deed declares. \* \* \* " (Emphasis added.)

In the case before us, rights and interests granted in the deed of easement dated 28 December 1945 reverted, by the terms of the instrument itself, to the plaintiff or her predecessors in title five years after the date thereof. Admittedly, the consequences of this reversion may be harsh from the viewpoint of the defendant, but the judgment complained of results solely from defendants' failure to ensure that the easement they relied upon was in force *before* they undertook the project of rebuilding the dam. We are not at liberty to extract from the plaintiff and give to the defendants, in the name of equity, an easement which these defendants have never possessed.

[5] Defendants also contend that the easement granted was on a condition subsequent, and that no right of re-entry was reserved; however, no act of re-entry by the grantor would be necessary in the case before us, because, at the time of the breach of the condition, the plaintiff's predecessors in title were *in possession* of the servient tract. *McDowell v. R.R., supra*. Furthermore, we have previously noted that the language of the deed in question indicates that the easement granted was determinable, and reverted automatically, rather than being upon a condition subsequent.

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Utilities Comm. v. Town of Pineville

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The defendants, in their brief, present a number of additional contentions which require no discussion in light of our holding that the hearing judge did not commit error in his construction of the easement relied upon by defendants.

The motion for summary judgment permitted the trial judge, in rendering his ruling on the motion, to consider the pleadings, answers to interrogatories and admission on file, together with the affidavit offered. G.S. 1A-1, Rule 56(c). The trial judge correctly found from the evidence offered that there was no genuine issue as to any material fact except damages; therefore, the court properly entered a partial summary judgment, leaving that issue for later jury determination.

Affirmed.

Judges MORRIS and PARKER concur.

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STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION  
AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COM-  
PANY, APPLICANT AND THE ERVIN COMPANY v. TOWN OF  
PINEVILLE, NORTH CAROLINA AND PINEVILLE TELEPHONE  
COMPANY

No. 7210UC68

(Filed 29 March 1972)

1. Utilities Commission § 2— public utility — municipal corporation

A municipal corporation is specifically excluded from the definition of a public utility under the provisions of G.S. 62-3(23)d.

2. Telephone and Telegraph Companies § 1— extension of telephone service area — area served by municipally-owned company — failure to hear all of intervenors' evidence

Where a municipality and a telephone company owned by the municipality were allowed to intervene in a hearing upon an application by Southern Bell Telephone Company to extend its telephone service area boundary to include an area served by the municipality's telephone company, the Utilities Commission erred in finding facts and approving the application after hearing only a portion of the evidence which the municipality and its telephone company desired to offer.

3. Utilities Commission § 1— conduct of hearing — judicial capacity

When the Utilities Commission conducts a hearing, it acts in a judicial capacity and must render its decisions upon questions of law and fact in the same manner as a court of record. G.S. 62-60.

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Utilities Comm. v. Town of Pineville

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APPEAL by Town of Pineville and Pineville Telephone Company from Order of North Carolina Utilities Commission dated 20 July 1971.

On 23 March 1971 Southern Bell Telephone and Telegraph Company (Southern Bell) filed with the North Carolina Utilities Commission (Commission), as information, its Eighteenth Revised Charlotte Exchange Service Area Map (Map), issued 22 March 1971 and effective 26 April 1971. In filing the map, Southern Bell indicated to the Commission that it was designed to reflect an extension of its Charlotte Exchange Service Area beyond the boundaries previously on file with the Commission, to include that part of the Raintree development (Raintree) north of Four Mile Creek and other adjacent areas not served by another public utility. The area within the boundaries of the Town of Pineville was specifically excluded.

On 30 March 1971 the Commission issued an order holding that the filing of the map affected the Town of Pineville and The Ervin Company (Ervin) developer of the Raintree development; that "it appears that a portion of said Raintree development lying south of the City of Charlotte and immediately north of the Town of Pineville is presently served by the municipally-owned telephone system of the Town of Pineville"; that the Town of Pineville and Ervin were entitled to notice and an opportunity to be heard; that the map was "suspended" pending a public hearing; that a hearing be held by the Commission on 19 May 1971 in connection with the filing of the map; and that a copy of the order be served on the Town of Pineville and Ervin.

On 23 April 1971 the Town of Pineville and the *Pineville Telephone Company*, in a petition for leave to intervene, signed by "Attorneys for Town of Pineville and Pineville Telephone Company, alleged:

"(1) That the correct names and addresses of petitioners are as follows:

Town of Pineville  
200-208 Dover Street  
Pineville, North Carolina  
  
Pineville Telephone Company  
200-208 Dover Street  
Pineville, North Carolina

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Utilities Comm. v. Town of Pineville

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(2) That the Pineville Telephone Company has been operated by the Town of Pineville since the telephone system was purchased by the Town of Pineville under date of March 28, 1938; that said system included and has continued to include much of the territory proposed to be an extension of the service area boundary by Southern Bell Telephone and Telegraph Company (hereinafter referred to as 'Southern Bell') in connection with its filing of Exchange Service Area Map, designated as Eighteenth Revised Charlotte Exchange Service Area Map, showing issue date March 22, 1971.

(3) That the approval of Southern Bell's Eighteenth Revised Charlotte Exchange Service Area Map would not be in the best interest of the public, same would be a duplication of service now offered by Pineville Telephone Company which service can be made available to additional customers including The Ervin Company, developers of the Raintree development.

(4) That prior to the purchase by the Town of Pineville of the telephone system in the area involved in the filing by Southern Bell herein, there had been no interest or indication of interest on the part of said Southern Bell and/or its predecessors in providing much needed telephone service in the area now proposed to be served and included in the Eighteenth Revised Charlotte Exchange Service Area Map.

(5) That the petitioners from the date of purchase of the telephone system referred to above tried at all times to develop and expand said telephone system as needs appeared and service requested.

(6) That the Commission should reject said Eighteenth Revised Charlotte Exchange Service Area Map and thereby prohibit an extension of the service area boundary of said Southern Bell beyond those boundaries previously on file with the Commission as said proposal affects the previously established service area of Pineville Telephone Company."

Ervin filed a petition dated 4 May 1971 for leave to intervene in which it alleged that it was the owner and developer of approximately 1,500 acres of land in Mecklenburg County,

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called Raintree; that North Carolina Telephone Company served the area south of Four Mile Creek; that Southern Bell and Pineville Telephone Company each serve to some extent a portion of Raintree that lies north of Four Mile Creek; that the facilities of Pineville Telephone Company were inadequate and its service was poor; and that Ervin had made demand on Southern Bell to provide service for the portion of Raintree lying north of Four Mile Creek.

Southern Bell, responding to the petition for leave to intervene filed by the Town of Pineville and Pineville Telephone Company, asserted that it was a public utility and subject to the jurisdiction of the Commission under Chapter 62 of the North Carolina General Statutes; that Ervin had demanded that it provide service; that it had filed the map reflecting an extension of its Charlotte Exchange Service Area to include the area shown thereon outside the town limits of Pineville but not included in the telephone service area of any other "public utility" under the jurisdiction of the Commission; that by filing the map it indicated its willingness to serve any person in this area; that it did not desire "to prevent present customers of the Pineville Telephone Company from continuing to receive telephone service from that company"; and requested that the Commission recognize the filing of the map as a representation of its willingness to serve the area included in it.

By order dated 10 May 1971, the Commission allowed the Town of Pineville, Pineville Telephone Company and Ervin to intervene, declared them to be parties, and permitted them to participate in the hearing.

The public hearing was begun 19 May 1971. At the hearing Southern Bell offered the map in evidence and offered testimony that Ervin had petitioned it for service in the Raintree area. Southern Bell's evidence also tended to show that the area shown on the map would extend its Charlotte Service Area boundary to a line contiguous with the boundary of an area served by North Carolina Telephone Company, to a line along the boundary line between North Carolina and South Carolina and to a line representing the town limits of the Town of Pineville.

Intervenor Ervin offered evidence that part of the area shown on the map was being served by Pineville Telephone

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Company; that the service rendered by Pineville Telephone Company was not satisfactory; and that it had requested Southern Bell to serve that part of Raintree not served by another public utility.

Intervenor Town of Pineville and Pineville Telephone Company offered evidence that the Town of Pineville, a municipal corporation, had purchased "this system" for \$7,000 from S. L. Meacham, an individual, on 1 April 1938. Robert K. Taylor testified that he was the Mayor of the Town of Pineville at the time and "(s)o we decided, the Board, all of us decided we would buy it for \$7,000, so we didn't have the money at the time to buy it but issued bonds for it, had an election for the people to vote on it, and we got the money, fixed it up . . . but people, 51 over there, couldn't get Southern Bell to run a line up there at this time, 1938 and 1937 and on up because there wasn't enough customers. \* \* \* Pineville from the time of purchase began to operate the system. We operated the system within the city limits and outside the city limits. We ran lines out beyond the city limits, and we had people out in that area who wanted service. They could not get service from anyone else. During the time I was mayor, the Town Board took steps to try to improve the service and improve the equipment. They spent lots of money and put it in good shape."

Sam A. Satterfield, another witness for the Intervenor Town of Pineville and Pineville Telephone Company, testified:

"I served as Town Clerk of the Town of Pineville for a period of eight years from 1938 to 1946. I came in as Town Clerk following the purchase by the Town of Pineville of the telephone system. I had the responsibility of operating the system. I was foreman over the maintenance man and selected to keep the books. \* \* \* I am presently a member of the Town Board, and have been serving in that capacity for four years. I have lived in Pineville during all this period. During the time I have sat on the Board, there have been requests for service to come to the Board from time to time. Efforts have been made to comply with all these requests. \* \* \* Yes, we are making money. As to how much we made last year, I am not the bookkeeper."

Prior to the presentation of this evidence, the attorney for the Town of Pineville and the Pineville Telephone Company had

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announced to the Commission that they had six witnesses to offer—"three of whom will take considerable time." The Chairman of the Commission had stated at that time, "We don't mind staying with you awhile. It is now quarter to five." The attorney replied in part, "I think we could get two or three maybe short ones." Whereupon they offered three witnesses. After these three witnesses testified, Ervin made an oral motion "that this matter should be determined on the law," and the Chairman of the Commission stated, "We will recess to a date hereinafter and we will advise you of that date." On 30 June 1971 the Commission, after considering the oral motion of Ervin, issued an order allowing the parties until 14 July 1971 to file briefs with respect thereto.

On 15 July 1971, the Town of Pineville filed a motion asking the Commission to issue an order "requiring Southern Bell Telephone and Telegraph Company to cease and desist from engineering and construction of facilities for the purpose of serving the Raintree area." Attached to this motion was a letter from Southern Bell to the Commission dated 13 July 1971 indicating an intent to install services to Ervin in the Raintree area on 16 July 1971. This motion to cease and desist was denied on 16 July 1971.

Under date of 20 July 1971, after briefs had been filed but without any further hearing, the Commission ruled on the oral motion of Ervin and found that Southern Bell was a public utility engaged in conveying and transmitting messages and communication by telephone; that the map filed reflected an extension of its service area to include contiguous territory in Mecklenburg County; that the Town of Pineville purchased a telephone system in 1938 and since that time had rendered telephone service to the public within, and to some extent outside of, its limits, and within the area embraced within the map; that the territorial extension included in the map was not now receiving telephone service from another public utility; that the Town of Pineville and Pineville Telephone Company (which was owned by said Town) was not a "public utility"; that Southern Bell and the Town of Pineville offer limited telephone service in the area involved; and that by filing the map Southern Bell indicated its willingness to serve any person who might request service in the area included therein.

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Upon the foregoing findings of fact, the Commission on 20 July 1971 made the following conclusions and entered the following order:

“The Public Utilities Act of this State authorizes public utilities to extend their certificated service areas into contiguous areas not receiving similar service from other public utilities, without the necessity of obtaining a Certificate of Public Convenience and Necessity. (N.C. G.S. 62-110)

It is clear that the Town of Pineville (and Pineville Telephone Company, owned and operated by the Town of Pineville) is not a ‘public utility’ as defined by the Public Utilities Act for the reason that municipalities are excluded from said definition. (N.C. G.S. 62-3(23)d.) Therefore, said Town of Pineville is not subject to the jurisdiction of this Commission and is not obligated nor protected by the Public Utilities Act.

In view of the fact that the area included in the Eighteenth Revision of the Charlotte Exchange Service Area Map is not an area served by another ‘public utility’, S.B.T.&T. has the lawful right to express its willingness to serve, and in fact to serve any person in this area who might request its service, the same being contiguous to their present service area; and indeed, having filed such a revision, Southern Bell will be obligated to so serve upon approval by the Commission.

The filing by S.B.T.&T. of the subject map does not prevent customers of Pineville Telephone Company from continuing to receive telephone service from that Company, nor others from receiving such service in the future if they so desire.

The Commission concludes that this is a matter which should be determined upon the Motion of Ervin without further public hearings and that the suspension of the Eighteenth Revised Charlotte Exchange Service Area Map filed herein on March 23, 1971, should be vacated to the end that the same shall be approved and allowed to become effective.

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IT IS, THEREFORE, ORDERED as follows:

1. That the suspension of the Eighteenth Revised Charlotte Exchange Service Area Map filed herein on March 23, 1971, by Southern Bell Telephone and Telegraph Company be, and the same is, hereby vacated and set aside.

2. That the said Eighteenth Revised Charlotte Exchange Service Area Map filed herein on March 23, 1971, be, and the same is, hereby approved and allowed to become effective as provided by law."

The Town of Pineville and Pineville Telephone Company appealed to the Court of Appeals.

*Edward B. Hipp and Maurice W. Horne for North Carolina Utilities Commission, appellee.*

*Joyner & Howison by James M. Kinzey for Southern Bell Telephone and Telegraph Company, appellee.*

*Broughton, Broughton, McConnell & Boxley by J. Melville Broughton, Jr., J. Mac Boxley and Charles P. Wilkins; and Kenneth R. Downs for the Town of Pineville and Pineville Telephone Company, appellant.*

MALLARD, Chief Judge.

[1] The Town of Pineville, in Mecklenburg County, is a municipal corporation existing since 1873. See Chapter 41 of the Private Laws of 1973 and Chapter 296 of the Session Laws of 1965. A municipal corporation is specifically excluded from the definition of a public utility under the provisions of G.S. 62-3(23)d. See also, *Dale v. Morganton*, 270 N.C. 567, 155 S.E. 2d 136 (1967). In the appellant's brief, the Town of Pineville and Pineville Telephone Company are referred to as if they were two separate entities; however, it is not revealed in the record what kind of legal entity the Pineville Telephone Company is, if any. Upon the oral argument before this court, the attorney for the Town of Pineville stated that the "Pineville Telephone Company" was not a corporate entity, a partnership, or an individual, but was an "unincorporated association of people."

[2] The principal contention of the Town of Pineville and the Pineville Telephone Company is that they were not permitted to offer all their evidence and that the Commission committed error

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in finding facts on the evidence offered without affording them an opportunity to complete the offering of their evidence. They also contend that the facts so found were improperly used as a basis for conclusions of law and entry of an order adverse to their interests.

The Commission found as a fact from the evidence presented, and concluded as a matter of law from the facts so found, that the Town of Pineville and the Pineville Telephone Company, were not a "public utility" within the meaning of the Public Utilities Act. Under this Act (Chapter 62 of the General Statutes), a public utility is, among other things:

"a. . . . (A) person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

\* \* \*

6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation."

G.S. 62-3(23).

A "person" as defined in the Act is:

" . . . (A) corporation, individual, copartnership, company, association, or any combination of individuals doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof." G.S. 62-3(21).

In this connection, however, we note that the Charter of the Town of Pineville was revised by Chapter 296 of the Session Laws of 1965 and now contains the following provisions authorizing the town:

"(2) To furnish all local public services; to purchase, hire, construct, *own, maintain and operate* or lease *local public utilities*, to acquire, by condemnation or otherwise, within or without the corporate limits, property necessary for any such purposes, subject to restrictions imposed by general law for the protection of other communities; and

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to grant local public utility franchises and regulate the exercise thereof.

\* \* \*

*Sec. 33. Saving Clause. If any part of this Charter shall be declared invalid by a court of competent jurisdiction, such judgment shall not invalidate the remainder of the Charter. The provisions of this Charter shall supersede all laws and ordinances not consistent herewith, insofar as the Town of Pineville is affected thereby.*" (Emphasis added.)

The Commission, after having entered an order permitting the Town of Pineville and the Pineville Telephone Company to intervene and offer some of their witnesses, did not advise them of a date for a further hearing to receive evidence and did not permit them to offer all of their evidence. In entering the order the Commission stated that it made findings of fact "upon consideration of the entire record in this matter, *including evidence and exhibits of the parties.*" We hold that it was error for the Commission, after permitting the Town of Pineville and the Pineville Telephone Company to intervene and declaring them parties, to fail to hear and consider all of their evidence insofar as it was competent.

[3] When the Commission is conducting a hearing, it is acting in a judicial capacity and shall render its decisions upon questions of law and of fact in the same manner as a court of record. G.S. 62-60. Controverted questions of fact, or issues of fact, are decided in a court of record after all of the competent evidence of the parties is offered with respect thereto. In the matter before us, the Commission was informed at the hearing on 19 May 1971 that the Town of Pineville and the Pineville Telephone Company had additional witnesses to offer. The Commission, however, proceeded to find the facts *after considering the evidence already offered* without ever having heard these additional witnesses. It may be that the Town of Pineville and the Pineville Telephone Company will be unable to offer competent evidence sufficient to support a different result, but under the circumstances of this case, they are entitled to the opportunity to do so.

The question of whether the Commission committed error on 16 July 1971 when it denied the motion of the Town of Pineville (alone), filed 15 July 1971, requesting that Southern Bell

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be ordered to cease and desist from the engineering and construction of facilities for the purpose of serving Raintree is not properly presented and is not decided. The Town of Pineville and Pineville Telephone Company have other assignments of error which we do not deem necessary to rule on in view of the disposition of this appeal.

The "Commission's Final Order" entered herein under date of 20 July 1971 is vacated and this cause is remanded for further proceedings herein as provided by law.

Error and remanded.

Judges MORRIS and PARKER concur.

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HARRY LEE HUGGINS AND WIFE, ELIZABETH HUGGINS v. RUSSELL W. DEMENT, JR., SUBSTITUTED TRUSTEE, CENTRAL FINANCE COMPANY, AND BETTY LOU BRITT

No. 7210SC180

(Filed 29 March 1972)

1. Mortgages and Deeds of Trust § 26— foreclosure sale — notice to debtor

There is no requirement that a debtor in default be given personal notice of a foreclosure sale absent a valid contract to give such notice.

2. Mortgages and Deeds of Trust § 26— foreclosure sale — notice to debtor — due process

Notice of foreclosure by sale provided for in a deed of trust or required under G.S. 45-21.17(b), and notice of resale under G.S. 45-21.29(b)—advertisement at the courthouse door and in a newspaper—held sufficient to meet due process requirements.

3. Mortgages and Deeds of Trust § 13— foreclosure sale — breach of fiduciary duty by trustee — insufficiency of complaint

Plaintiffs' complaint failed to state a claim for relief against defendant trustee for breach of fiduciary duty in a foreclosure sale under a deed of trust, where the complaint does not allege that the trustee did anything other than adhere to every requirement of the deed of trust and the applicable statutes and act in good faith.

APPEAL by plaintiffs from *Braswell, Judge*, 25 October 1971 Session, WAKE Superior Court.

Plaintiffs, Harry Lee Huggins and wife, Elizabeth Huggins, instituted this action on 23 September 1971 to have de-

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clared null and void the sale under foreclosure of a deed of trust executed by them and to recover both actual and punitive damages.

The complaint, except where quoted verbatim, alleges in substance as follows:

1. The residences of the parties;
2. The plaintiffs were owners of the tract of land in question by virtue of a deed dated 25 January 1965;
3. "That on or about the 23rd day of December, 1966, the plaintiffs executed a deed of trust to D. S. Deese, Trustee for the Central Finance Company, securing an obligation in the amount of Seven Hundred Ninety-Eight and 90/100 Dollars (\$798.90), which deed of trust was recorded in the office of the Register of Deeds of Wake County in Book 1749 at Page 495";
4. On 27 January 1969 a judgment in the amount of Two Hundred Twenty-Eight and 65/100 Dollars (\$228.65) plus costs was entered in favor of Central Finance Company against the plaintiff, Harry Lee Huggins;
5. On the 5th day of February, 1969, the defendant Russell W. DeMent, Jr., was substituted as trustee in lieu of D. S. Deese;
6. "That on or about the 20th day of March, 1969; acting under instructions from the defendant Central Finance Company, the defendant Russell W. DeMent, Jr., Trustee, instituted foreclosure proceedings pursuant to the provisions of said deed of trust, by posting a notice thereof on the courthouse door of the Wake County Courthouse, and causing notice of said foreclosure proceedings to be run in the Raleigh Times on the 24th and 31st day of March and the 7th and 18th day of April, 1969";
7. "That no notice was given or attempted to be given to either of the plaintiffs of said sale other than the posting of said notice at the Wake County Courthouse door and the notice published in the Raleigh Times, although the plaintiff Harry Lee Huggins resided at all times at 700 Jamaica Drive, Raleigh, North Carolina, as the defendants, DeMent and Central Finance Company, well knew, or should have known";

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8. "That neither plaintiff had any knowledge of the pending foreclosure sale of said property";

9. Pursuant to said notice, the defendant DeMent offered the property for sale at the Wake County Courthouse door on 21 April 1969, and D. S. Deese became the highest bidder for Two Hundred Seventy-Five Dollars (\$275.00);

10. An upset bid was submitted, and the property was ordered resold by the Clerk of Wake County Superior Court;

11. "That the defendant DeMent posted notice of resale at the Courthouse door in the Wake County Courthouse in Raleigh, North Carolina, and published notice of such resale in the Raleigh Times on the 25th day of May and the 6th day of June, 1969";

12. "That no personal notice was given to or attempted to be given to either of the plaintiffs other than the posting of said notice at the Courthouse door and the publishing of said notice in the Raleigh Times as aforesaid, although the plaintiff, Harry Lee Huggins, resided at all times at 700 Jamaica Drive, Raleigh, North Carolina, and the defendants, DeMent and Central Finance Company, well knew, or should have known";

13. "That neither plaintiff had any knowledge of the pending resale of said property";

14. Pursuant to said notice, the defendant DeMent offered the property for resale at the Wake County Courthouse door on 12 June 1969, and defendant Britt became the highest bidder for Four Hundred and One Dollars (\$401.00);

15. The resale was reported and confirmed by order of the Clerk of Wake County Superior Court on 10 July 1969, and by deed the defendant DeMent, as trustee, purported to convey the property to the defendant Britt.

16. "That at no time did the defendant DeMent or the defendants (sic) Central Finance Company advise or undertake to advise the plaintiffs or either of them of the pendency of the said foreclosure proceeding";

17. "That at no stage of the proceedings and for a period of almost two years after the Deed from the defendant

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DeMent to the defendant Britt did the plaintiffs, or either of them, have any knowledge of the foreclosure of the plaintiff's property hereinbefore set out";

18. "That said property is worth in excess of Ten Thousand Dollars (\$10,000.00) and the inadequacy of said price of Four Hundred One Dollars (\$401.00) is patent";

19. "That the failure of the defendants DeMent or Central Finance Company to give notice to the plaintiffs, or either of them, is a violation of the Constitutional Rights of the plaintiffs, in that the plaintiffs were deprived of their property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States and of Article One, 17 of the Constitution of North Carolina";

20. "That by reason of the failure of the defendants DeMent or Central Finance Company, or either of them to give actual notice to the plaintiffs, or either of them, the purported sale by the defendant DeMent and the purported deed from the said defendant DeMent to the defendant Britt is ineffectual to convey any title to the said defendant Britt, and is null, void and of no effect."

Plaintiffs ask that the sale be set aside and the trustee's deed thus be declared null and void; that the defendant Britt be restrained from encumbering, selling, transferring, or otherwise disposing of the property pending the outcome of this suit; and that the plaintiffs recover from defendants \$10,000 in actual damages and \$10,000 in punitive damages.

Judge Braswell issued a show cause order on 23 September 1971 setting a date for hearing. All of the defendants filed answers wherein each set forth as their first defense a motion to dismiss for failure to state a claim upon which any relief may be granted. An affidavit was filed wherein D. S. Deese, as president of Central Finance Company, deposed that he instructed defendant DeMent, as substituted trustee, to foreclose the deed of trust after the plaintiffs defaulted. Said affidavit incorporated as exhibit A the deed of trust which included a power of sale in the trustee. An order dismissing the action against defendant Britt and judgments in favor of defendants DeMent and Central Finance Company were entered; whereupon, plaintiffs gave notice of appeal.

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*Jacob W. Todd for plaintiff appellants.*

*James R. Rogers III for Central Finance Company, defendant appellee.*

*Hatch, Little, Bunn, Jones and Few, by E. Richard Jones, Jr., for Betty Lou Britt, defendant appellee.*

*Philip O. Redwine for Russell W. DeMent, Jr., defendant appellee.*

MORRIS, Judge.

Plaintiffs contend that the trial court erred in ruling the complaint failed to state a claim upon which relief can be granted.

“ . . . [S]tatutory provisions are, by operation of law incorporated in all mortgages and deeds of trust and control any sale under such instruments.” *In re Register*, 5 N.C. App. 29, 35, 167 S.E. 2d 802, 807 (1969).

G.S. 45-21.17(a) provides that “When the instrument pursuant to which a sale of real property is to be held contains provisions with respect to posting or publishing notice of sale of the real property, such provisions shall be complied with, and compliance therewith is sufficient notice.”

The deed of trust executed by these parties provided for a power of sale in the trustee to become effective upon demand of the creditor if the debtor was in default. The parties agreed, as explicitly set forth in the instrument, that upon foreclosure “it shall be lawful for and the duty of the Trustee to advertise at the County Courthouse door in Wake County aforesaid, for a time not less than 30 days, and in a newspaper published in Wake County once a week for four consecutive weeks . . . .”

[We note in passing that the notice provision included in the deed of trust is almost identical to the provisions of G.S. 45-21.17(b) which applies when the parties make no provision for notice in the instrument.] According to G.S. 45-21.17(a), compliance with the above quoted notice procedure as agreed upon by the parties, if strictly complied with, is sufficient to give notice of the original foreclosure by sale. *Foust v. Loan Asso.*, 233 N.C. 35, 62 S.E. 2d 521 (1950). Plaintiffs allege in their complaint that foreclosure procedures were instituted “pur-

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suant to the provisions of said deed of trust." "The law presumes regularity in the execution of the power of sale in a deed of trust duly executed and regular upon its face; and if there is any failure to advertise properly, the burden is on the attacking party to show it. (Citations omitted.)" *Biggs v. Oxendine*, 207 N.C. 601, 603, 178 S.E. 216 (1935).

G.S. 45-21.29(b) provides that:

"Notice of any resale to be held because of an upset bid shall—

(1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale.

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; . . ."

[1] The plaintiffs made no allegation in the complaint of a failure to observe the notice provisions either of the deed of trust at the original sale or of the statutory requirements of G.S. 45-21.29(b) upon resale. Instead plaintiffs allege that they were entitled, as debtors in default, to personal notice of a foreclosure by sale. The North Carolina Supreme Court said in *Woodell v. Davis*, 261 N.C. 160, 134 S.E. 2d 160 (1964), that there is no requirement of personal notice absent a valid contract to give personal notice to the debtor who is in default, and this Court has espoused that proposition more recently in *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E. 2d 690 (1970), cert. denied 277 N.C. 251 (1970).

"It may well be appropriate, desirable, and courteous in many instances for a trustee to give actual notice to the debtor, the representative of his estate, or his heirs, of an intention to advertise and sell under a power of sale, nevertheless, such actual notice is not required as a matter of law (Citation omitted.)" *Hodges v. Wellons*, *supra*, at p. 156.

Plaintiffs would distinguish those cases in that no constitutional issue was raised nor considered in either of them. Plaintiffs assert that they were deprived of their property

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without due process of law because the notice given was not reasonably calculated to afford them an opportunity to be heard, citing *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), and *Harrison v. Hanvey*, 265 N.C. 243, 143 S.E. 2d 593 (1965).

[2] We are cognizant of the rule that: "the principal object in publishing notice of sale of mortgaged property in the exercise of a power of sale is not so much to notify the grantor or mortgagor as it is to inform the public generally, so that bidders may be present at the sale and a fair price obtained; . . . ' 59 C.J.S., Mortgages § 563." *Woodell v. Davis, supra*, at p. 163. We hold that the notice of foreclosure by sale as provided for in the deed of trust and as required under the statute was sufficient to meet the minimum due process requirements. See *D. H. Overmyer Co., Inc. v. Frick Company*, 40 LW 4221 (1972) and *Nellie Swarb v. William M. Lennox*, 40 LW 4227 (1972).

*Overmyer* (decided 24 February 1972) came up from Ohio and presented the question of the constitutionality under the Due Process Clause of the Fourteenth Amendment of a cognovit note authorized by an Ohio statute. The note contained the maker's consent in advance to the holder's obtaining a judgment without notice or hearing if the maker were in default in the payment thereof. Plaintiff's position was that it is unconstitutional to waive in advance the right to present a defense in an action on the note. Plaintiffs take a similar position here in a closely analogous situation. In *Overmyer* there was no allegation of unequal bargaining power or overreaching, nor is there here. In *Overmyer*, Mr. Justice Blackmun, writing for the Court, said:

"The due process rights to notice and hearing prior to a civil judgment are subject to waiver. In *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), the Court observed: '[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.' 375 U.S., at 315-316. And in *Boddie v. Connecticut, supra*, the Court acknowledged that 'the hearing required by due process is subject to waiver.' 401 U.S., at 378-379."

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*Swarb* (decided the same day) came up from Pennsylvania, and was also concerned with the issue of the due process validity of cognovit provisions. This was a class action and attempted to have the Court declare the Pennsylvania statutes leading up to confessed judgments unconstitutional on their face as violative of due process. The Court refused to do so and affirmed the District Court's holding that the Pennsylvania system leading to confessed judgment and execution does comply with due process standards provided there has been an understanding and voluntary consent of the debtor in signing the document.

In this action, the allegations of failure to give notice fail to state a claim upon which relief can be granted.

[3] Plaintiffs contend that their complaint states a claim against the defendant trustee (DeMent) for his failure to abide by the duties imposed on him as a fiduciary, and that the court erred in dismissing their claim for relief.

"A gross inadequacy of purchase price, when coupled with any other inequitable element, will induce the court to interpose and do justice between the parties. *Weir v. Weir*, 196 N.C. 268, 145 S.E. 281. However, no irregularity in the foreclosure sale is alleged here. The only obligation of the trustee to the heirs and estate of the debtor was to conduct and consummate the foreclosure sale in accordance with law. There is no suggestion that the trustee did otherwise." *Hodges v. Wellons*, *supra*, at p. 157.

A trustee is bound to use good faith and diligence in appraising both the creditor and debtor of the intention of selling.

"He is charged with the duty of fidelity as well as of impartiality, of good faith and every requisite degree of diligence, of making *due advertisement* and *giving due notice*. (Citations omitted.)" (Emphasis added.) *Mills v. Building & Loan Assn.*, 216 N.C. 664, 669, 6 S.E. 2d 549 (1940).

Plaintiffs' complaint does not allege that the defendant trustee did anything other than adhere to every requirement of the deed of trust and of the applicable General Statutes. Plaintiffs' complaint does not allege that the trustee was negligent or imprudent [*Davenport v. Vaughn*, 193 N.C. 646, 137 S.E. 714 (1927)]; nor does it contend that the trustee did not strictly comply with the power of sale [*Jessup v. Nixon*, 199

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N.C. 122, 154 S.E. 18 (1930)] ; nor does it allege that the trustee represented both buyer and seller at the foreclosure sale [*Davis v. Doggett*, 212 N.C. 589, 194 S.E. 288 (1937) ; *Mills v. Building & Loan Assn.*, *supra*].

The court properly granted a motion to dismiss filed under Rule 12(b) (6) for failure to state a claim upon which relief could be granted. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

No error.

Chief Judge MALLARD and Judge PARKER concur.

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MRS. PEGGY MILLS v. KOSCOT INTERPLANETARY INC.,  
A FOREIGN CORPORATION

No. 7222SC9

(Filed 29 March 1972)

1. Rules of Civil Procedure § 12— motion for judgment on pleadings — amendment of complaint

Defendant's motion for judgment on the pleadings is to be passed upon by the appellate court in light of the evidence presented at the trial and the amendment to the complaint which was thereafter allowed by the trial court. G.S. 1A-1, Rule 12.

2. Contracts § 25— sale of distributorships — breach of contract — sufficiency of complaint

Plaintiff's complaint stated a claim for relief for breach of contract where it alleged that plaintiff entered into a contract with defendant pursuant to which plaintiff paid defendant \$2500 for the right to sell distributorships in its organization, that unbeknownst to plaintiff, defendant entered into a consent judgment which in effect prevented plaintiff from selling distributorships, and that the right to sell distributorships was the primary inducement for the contract and payment of \$2500 to defendant.

3. Rules of Civil Procedure §§ 12, 41— motion for directed verdict — motion for dismissal

A motion for a directed verdict is proper only in a jury trial; where the case is tried without a jury, the proper motion is for involuntary dismissal under Rule 41(b).

4. Contracts § 27— distributorships — breach of contract

The trial court properly denied defendant's motion to dismiss an action for breach of contract where plaintiff's evidence tended to

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show that she paid defendant \$2500 to become a director distributor in defendant's organization, that she did so in reliance on defendant's representations that its activities were legal, that defendant has been advised by the Secretary of State that its operations might be illegal, that a material benefit of being a director distributor is the right of selling other distributorships, and that defendant entered into a consent decree which prevents plaintiff from selling distributorships.

**5. Contracts § 27— breach of contract — act rendering performance impossible**

Where plaintiff's evidence shows a contract and an act by defendant rendering it impossible for plaintiff to perform his part of the agreement, a *prima facie* case of breach of contract has been made out.

**6. Fraud § 1— knowledge that representation was false**

In order to make out a case of fraud, plaintiff must show, among other things, that defendant knew that the representation was false, or that he made it recklessly without any knowledge of its truth and as a positive assertion.

**7. Damages § 11— punitive damages for fraud**

In order to recover punitive damages for fraud, there must be some element of aggravation, as when the wrong is done wilfully or under circumstances of rudeness or in a manner which evinces a reckless and wanton disregard of another's rights.

**8. Damages § 11; Fraud § 12— representations as to legality of defendant's operations in N. C.—insufficiency of evidence of fraud**

Defendant's representations to plaintiff that its operations in this State were legal did not constitute fraud entitling plaintiff to punitive damages, notwithstanding defendant was aware of an opinion issued by the North Carolina Attorney General that its operations were illegal and defendant thereafter entered into a consent judgment agreeing to cease acceptance of applications for distributorships in this State, where defendant had been advised by legal counsel that its operations in this State were legal, defendant did not admit illegality in the consent judgment entered against it, and there has been no judicial determination that defendant's operations were not lawful.

APPEAL by plaintiff and defendant from judgment of *Crissman, Judge*, at the 26 April 1971 Session of IREDELL Superior Court.

Plaintiff seeks to recover compensatory damages for an alleged breach of contract, and also punitive damages for alleged fraud in inducing plaintiff to enter into the contract.

The defendant answered denying any breach of contract or any fraud in the procurement thereof. There was a request

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for admissions filed by the plaintiff and answered by the defendant. A pre-trial conference was held at which time certain stipulations were entered into. Subsequent to the pre-trial conference, defendant moved for judgment on the pleadings in its favor and to dismiss plaintiff's cause of action for failure to state a claim for relief. This motion was denied, and the trial proceeded.

The case was tried by the Judge without a jury.

The evidence on behalf of the plaintiff may be summarized as follows:

Defendant is a corporation engaged in the sale of cosmetics in North Carolina. In November 1968 defendant held several meetings in Statesville and Charlotte, North Carolina. These meetings were conducted by agents of defendant and were referred to as "Golden Opportunity Meetings." Substantial portions of the meetings were devoted to discussion of the financial rewards available to those who purchased distributorships. Those who purchased distributorships were to receive a commission of \$2500 for each director distributorship they sold and a commission of \$500 for each supervisory distributorship they sold. There were other financial advantages from the purchase of a distributorship such as the right to purchase cosmetics from defendant for resale at a substantial markup. The primary inducement to purchase a distributorship was the right to sell other distributorships.

At one of the meetings the defendant's agent was asked if defendant's operations in North Carolina were legal. He assured those in attendance that inquiry had been made, and the operations were legal. Plaintiff was present at this meeting and heard this assurance.

Relying on the representations made at the meeting and the assurance that defendant's operations were legal, plaintiff entered into a contract with defendant on 8 November 1968 in which she became a director distributor. The position was described in the Distributor's Wholesale Manual which was presented into evidence. Plaintiff paid defendant \$2500 for her distributorship. Between 8 November 1968 and 4 June 1969 plaintiff sold one supervisory distributorship for which she received a commission of \$500.

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Prior to the transactions with plaintiff, defendant had been contacted by the Secretary of State's office for the purpose of discussing the legality of defendant's operations in North Carolina. A meeting in the Secretary of State's office had been held in March 1968 and at that time defendant's agent had been informed that the Secretary of State's office believed the operation to be in violation of the laws of North Carolina and the Attorney General had rendered an opinion to this effect. Defendant was advised that the State might institute an action against it in the future.

Subsequently, a civil action had been instituted against the defendant by the State and pursuant thereto a consent judgment was entered into on 4 June 1969. In the consent judgment defendant agreed to cease accepting applications for distributorships in North Carolina and agreed not to sell any distributorships in the future without the approval of the Attorney General. There is no evidence that such approval has ever been obtained.

The plaintiff was not a party to the consent judgment or the action it concluded. Her ability to sell distributorships was, of course, effectively terminated by the consent judgment.

The defendant, in the consent judgment, does not admit the illegality of its operations in North Carolina, and there has been no judicial determination that defendant's operations are in violation of any law.

Defendant moved for a directed verdict at the close of plaintiff's evidence, and this motion was denied. The defendant then introduced evidence to the effect that it had been advised by legal counsel that it was not in violation of any laws of the State of North Carolina. There was further testimony that plaintiff had received sales training and had the right to acquire products at a discount and still had all other rights of her directorship with the exception of the right to sell supervisorships and directorships in the State of North Carolina.

Defendant renewed its motion for a directed verdict at the close of all the evidence, and this motion was denied.

At the conclusion of all the evidence the plaintiff was granted permission to file an amendment to the complaint and this was done.

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The trial court made findings of fact and conclusions of law in favor of the plaintiff on the issue of breach of contract and awarded \$2,000 compensatory damages. The trial court found in favor of the defendant on the issue of fraud and denied any punitive damages to the plaintiff.

From this judgment both plaintiff and defendant appealed.

*Raymer, Lewis & Eisele by Douglas G. Eisele for plaintiff appellant and appellee.*

*Broughton, Broughton, McConnell and Boxley by John D. McConnell, Jr., for defendant appellant and appellee.*

CAMPBELL, Judge.

DEFENDANT'S APPEAL

[1] Defendant asserts that its motion for judgment on the pleadings should have been sustained. We do not agree. This motion was made under Rule 12 of the North Carolina Rules of Civil Procedure, G.S. 1A-1, Rule 12. The defendant's motion was made prior to the amendment to the complaint. It is to be passed upon, however, in the light of the evidence presented at the trial and the amendment to the complaint which was thereafter allowed by the trial court. 2A Moore's Federal Practice, § 12.15, p. 2349 (2d Ed. 1968). When so considered under the new notice theory of pleading, we think the complaint as amended was sufficient. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

[2] Under the pleadings as amended defendant was put on notice that plaintiff claimed to have entered into a contract with defendant pursuant to which plaintiff had paid the defendant \$2500 for the right to sell distributorships; that unbeknownst to the plaintiff, defendant entered into a consent judgment pursuant to which plaintiff was effectively prevented from reaping the rewards to which she was entitled by her contract since she no longer could sell distributorships and that this was the primary inducement for the contract and payment of \$2500 to the defendant by the plaintiff.

[3] Defendant next argues that it was error for the trial court to deny its motions for a directed verdict at the close of the plaintiff's evidence and at the close of all the evidence.

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A motion for a directed verdict is proper only in a jury trial. Where the case is tried without a jury the proper motion is for involuntary dismissal under Rule 41(b). *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E. 2d 113 (1970), 279 N.C. 123, 181 S.E. 2d 438 (1971). We will treat the defendant's motions for a directed verdict as such. The motion made at the close of the plaintiff's evidence will not be considered as the defendant offered evidence and only the motion at the conclusion of all the evidence is therefore presented. *Wells v. Insurance Co.*, 10 N.C. App. 584, 179 S.E. 2d 806 (1971).

"In ruling on a motion to dismiss under Rule 41(b), applicable only 'in an action tried by the court without a jury,' the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover." *Knitting, Inc. v. Yarn Co.*, 11 N.C. App. 162, 180 S.E. 2d 611 (1971).

[4] The evidence presented by the plaintiff tended to establish that she paid defendant \$2500 to become a director distributor in defendant's organization; that she did so in reliance on defendant's representations that its activities were legal; that defendant had been advised by the Secretary of State that its operations might be illegal; that one of the material benefits of being a director distributor was the privilege of selling distributorships; that defendant entered a consent decree which prevented plaintiff from selling distributorships.

[5] The plaintiff has presented evidence of a contract, a breach by defendant and damages. Where plaintiff's evidence shows a contract and an act by defendant rendering it impossible for plaintiff to perform her part of the agreement, a prima facie case has been made out. *Cook v. Lawson*, 3 N.C. App. 104, 164 S.E. 2d 29 (1968). The question of credibility is one for the trier of the facts. The Judge properly denied the motion to dismiss.

The final assignment of error presented by the defendant is that the trial court committed error in its findings of fact, conclusions of law and judgment. As defendant admits, this is a broadside exception. It merely challenges the sufficiency of the facts found to support the judgment entered. *Browning v.*

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*Humphrey*, 241 N.C. 285, 84 S.E. 2d 917 (1954). We have, nevertheless, reviewed the evidence, and we conclude that it supports the findings of fact, and these in turn support the judgment rendered.

PLAINTIFF'S APPEAL

Plaintiff asserts that it was error for the trial court to conclude that she was not entitled to punitive damages for fraud.

[6] In order for there to be fraud, the plaintiff must show, among other things, that, "defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion." *Auto Supply Co., Inc. v. Equipment Co., Inc.*, 2 N.C. App. 531, 163 S.E. 2d 510 (1968), quoting from *Cofield v. Griffin*, 238 N.C. 377, 78 S.E. 2d 131 (1953).

[7] In addition for the plaintiff to recover punitive damages for fraud there must be some element of aggravation as when the wrong is done wilfully or under circumstances of rudeness or oppression or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights. *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785 (1953).

[8] The evidence in this case tends to show that while defendant was aware of an opinion to the contrary by the North Carolina Attorney General, nevertheless, defendant had been advised by legal counsel that its operations in North Carolina were lawful. Defendant did not admit illegality in the consent judgment entered against it. There has been no judicial determination that defendant's operations are not lawful. The most that can be said is that the question remains in doubt.

The trial judge concluded that the defendant, in representing that its operations were lawful, was merely stating an opinion of law concerning which there has not yet been any legal determination. He further concluded that the representations did not constitute fraud entitling the plaintiff to punitive damages. The plaintiff has failed to show that defendant knew its representations were false and that any representation was accompanied by such aggravation as would entitle plaintiff to punitive damages.

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The trial judge's conclusions are supported by his findings of fact, and the evidence supports the facts found. We find no error in the denial of punitive damages.

On plaintiff's appeal affirmed.

On defendant's appeal affirmed.

Judges BRITT and GRAHAM concur.

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FRANK H. KENAN, PETITIONER v. BOARD OF ADJUSTMENT OF THE TOWN OF CHAPEL HILL, F. W. HENGEVELD, WERNER HAUSLER, FREDDIE MERRITT, WALLACE WILLIAMS, DR. ROBERT H. FREY, REED J. McCracken, KATHERINE KLINGBERG, DAVID SHAW, JOHN E. EVANS, AND MARION R. ALEXANDER, RESPONDENTS

No. 7215SC272

(Filed 29 March 1972)

1. Municipal Corporations § 30— special use permit—decision by Board of Adjustment—legislative power

Where a municipal ordinance required the Board of Adjustment to issue a special use permit when it made certain affirmative findings specified in the ordinance, the Board's determination of whether to issue a special use permit was not an unlawful exercise of legislative power in violation of Article II, Section 1, of the N. C. Constitution.

2. Municipal Corporations § 30— denial of special use permit—insufficiency of applicant's evidence

The record supports the Board of Adjustment's denial of a special use permit for construction of a self-service gas station on the ground that the applicant had failed to produce sufficient evidence for the Board to make the findings required for issuance of such a permit.

APPEAL by petitioner from *Hobgood, Judge*, at the 20 September 1971 Civil Session of ORANGE County Superior Court.

The petitioner, Frank H. Kenan, is the owner of certain property located at 112 West Franklin Street in the downtown area of Chapel Hill, North Carolina. The property has been used as an automobile service station for a number of years.

On January 15, 1971, petitioner submitted an application for a special use permit under Section 4, Special Use Permits,

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of the Ordinance Providing for the Zoning of Chapel Hill and Surrounding Areas (ordinance) for the construction of a self-service gasoline station to replace the existing service station. Fees were paid and documents were submitted in support of the application.

A special joint meeting of the Design Review Committee and the Community Appearance Commission was held on January 15, 1971 to consider petitioner's application. A memorandum was issued from this meeting finding, with certain recommendations, that there was no objection to the plans submitted by petitioner.

Pursuant to the requirements of the Ordinance, Section 4-B-1, a public hearing was conducted before the Zoning Board of Adjustment on February 1, 1971.

The petitioner presented a plan for the demolition of the present structure and its replacement by an open drive-in structure containing 10 self-service gasoline pumps and an office to remotely control each pump's operation. A landscape plan and a sign plan were presented. In response to questions by the Board, a Mr. Mallard, representing Kenan Oil Co., testified that in his opinion no traffic study was necessary because the size of the facility would eliminate traffic buildups on the public street. He testified that the facility would be open 24 hours a day and that an attendant would be on duty at all times. There was further testimony as to curbs, trash facilities, parking and observance of church hours. Testimony in opposition to issuance of a permit was heard from a number of citizens. At the request of the Planning Board the application was referred to that Board for study and recommendations prior to final action.

The Planning Board met on February 2, 1971, and considered petitioner's application. The Planning Board recommended that the application be denied for reasons which can be summarized as follows:

1. The proposal would be detrimental to public safety on two counts:
  - a. Operation of the self-service gasoline pumps 24 hours a day with only one attendant would constitute a fire hazard in the central business district.

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- b. The additional traffic generated by the facility would materially increase the congestion and danger in an already congested and dangerous traffic situation.
- 2. The use is not a public necessity.
- 3. The use is not in conformity with the expressed intent of the Planning Board and the Board of Aldermen to develop this portion of Franklin Street as a pedestrian-oriented area.

The Zoning Board of Adjustment met again on February 15, 1971, and received the report of the Planning Board. After consideration in executive session, the Board of Adjustment made the following findings of fact:

“(1) The Board found that on the evidence presented it was unable to find that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved.

(2) The Board found that the use meets the required conditions and specifications.

(3) The Board found that it was unable to determine that the use will not substantially injure the value of adjoining or abutting properties, and the Board found further that the use was not a public necessity.

(4) The Board found that it was unable to determine on the evidence that the location and character of the use, if developed according to the plan as submitted and approved, will be in general conformity with the plan of development of Chapel Hill and its Environs.”

The application of petitioner for a special use permit was denied.

Kenan petitioned the Superior Court of Orange County for a writ of certiorari. The writ was issued and the cause was heard before Judge Hobgood. The judge made findings of fact and conclusions of law in favor of respondents and sustained the decision of the Board of Adjustment.

From this judgment, the petitioner appeals.

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*Manning, Allen & Hudson by James Allen, Jr., for petitioner appellants.*

*Haywood, Denny & Miller by Emery B. Denny, Jr., for respondent appellees.*

CAMPBELL, Judge.

[1] Petitioner contends that under the ordinance, Sections 4-B-1(a), (1), (3) and (4), the Board of Adjustment is given the authority to grant or withhold special use permits in its discretion without proper standards. Petitioner argues that this is a delegation of the legislative power to an administrative body and is therefore unconstitutional under Article II, Section 1 and Article I, Section 19 of the North Carolina Constitution.

The authority of the Chapel Hill Board of Aldermen to enact a zoning ordinance and establish a Board of Adjustment was, at the time of this action, conferred by G.S. 160-172 which states in part that:

“ . . . Such [zoning] regulations may provide that a board of adjustment may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained.”

G.S. 160-178 in effect at the time of this action, provided further that:

“ . . . It [Board of Adjustment] shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance. . . .”

Petitioner contends that the Chapel Hill ordinance enacted pursuant to these statutes does not include sufficient standards to guide the Board of Adjustment and therefore the Board of Adjustment has, in effect, the power to legislate by deciding in its own discretion who shall and who shall not be issued special use permits.

The Chapel Hill ordinance requires that special use permits be issued before certain activities can be conducted. Among the activities covered is the operation of a drive-in business, specifically including automobile service stations. Ordinance, Section 4-D-6.

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In *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969), the North Carolina Supreme Court discussed extensively the problem of delegation of authority to administrative boards. In *Jackson*, Justice Lake quoted with approval the following from *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310 (1953):

“Here we pause to note the distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances.

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“In short, while the Legislature may delegate the power to find facts or determine the existence or non-existence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence, it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion. 11 Am. Jur., Constitutional Law, Sec. 234. \* \* \* ”

In *Jackson* the Court struck down a requirement that the Board of Adjustment find that the requested use did not “adversely affect the public interest.” The determination of what is in the public interest was held to be beyond the authority of the Board. The court did, however, uphold a provision of the ordinance requiring a permit to be granted “in accordance with the principles, conditions, safeguards and procedures specified in this ordinance,” or to be denied “when not in harmony with the purpose and intent of this ordinance.”

The Chapel Hill ordinance requires a permit to be issued only when the Board of Adjustment makes an affirmative finding as follows:

“(1) that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved,

(2) that the use meets all required conditions and specifications,

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(3) that the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity, and

(4) that the locations and character of the use, if developed according to the plan submitted and approved, will be in harmony with the area in which it is to be located and in general conformity with the plan of development of Chapel Hill and its environs." Ordinance, Section 4-B-1 (a).

In *Jackson* the Court stated the rule that:

"When a statute, or ordinance, provides that a type of structure may not be erected in a specified area, except that such structure may be erected therein when certain conditions exist, one has a right, under the statute or ordinance, to erect such structure upon a showing that the specified conditions do exist. The legislative body may confer upon an administrative officer, or board, the authority to determine whether the specified conditions do, in fact, exist and may require a permit from such officer, or board, to be issued when he or it so determines, as a further condition precedent to the right to erect such structure in such area. . . ."

The Chapel Hill ordinance does not allow the Board of Adjustment unbridled discretion. It has only the authority to determine whether the specified conditions have been met. This is within the proper authority of the Board under the rules set forth above.

One applying for a special use permit has merely to show that the use meets the conditions specified in the ordinance and a special use permit will be issued. The authority of the Board of Adjustment to determine whether the conditions specified in ordinance have been met is well within the rules set forth in *Jackson v. Board of Adjustment, supra*. We find the ordinance to be valid at the time this action was instituted.

[2] The petitioner's next contention is that the decision of the Board of Adjustment was not supported by competent, material and substantial evidence.

The findings of the Board, where unfavorable to petitioner, were that sufficient evidence had not been presented to allow

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the Board to determine if the conditions set out in the ordinance had been met.

The ordinance requires that certain conditions be met before a special use permit can be granted. The petitioner has the burden of satisfying the Board that it meets these conditions. *Craver v. Zoning Board of Adjustment*, 267 N.C. 40, 147 S.E. 2d 599 (1966). The Board in this case has not found as a fact that petitioner fails to meet the conditions set forth in the ordinance. It has merely found that petitioner has failed to produce sufficient evidence for the Board to make the required findings. There are no presumptions in favor of the petitioner and the petitioner merely failed in proof.

Petitioner had the burden of introducing evidence that the conditions required by the ordinance had been met. He failed to introduce such evidence. We find no merit in petitioner's argument.

Affirmed.

Judges BRITT and GRAHAM concur.

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RUTH GARDNER SELF, NEXT FRIEND OF T. BRYANT SELF, DECEASED EMPLOYEE V. STARR-DAVIS COMPANY, EMPLOYER; STANDARD FIRE INSURANCE COMPANY, CARRIER; ARMSTRONG SUPPLY CORPORATION, EMPLOYER; STANDARD FIRE INSURANCE COMPANY, CARRIER; C. E. THURSTON & SONS, INC., EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER; SPRINKMAN & SONS CONSTRUCTION CO., EMPLOYER; EMPLOYERS MUTUAL LIABILITY INS. COMPANY, CARRIER

No. 7218IC65

(Filed 29 March 1972)

Master and Servant § 68— workmen's compensation — asbestosis — acceleration of death caused by tumor

The Industrial Commission was correct in finding that death resulted from asbestosis within the meaning of [former] G.S. 97-61.6 based on evidence that asbestosis accelerated and contributed to the death but that the immediate or primary cause of death was an unrelated brain tumor.

APPEAL by defendants Starr-Davis Company and Standard Fire Insurance Company from the Order of the North Carolina Industrial Commission dated June 9, 1971.

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This claim was brought before the Industrial Commission by Ruth Gardner Self seeking compensation for the death of her husband, T. Bryant Self.

T. Bryant Self was employed by defendant Starr-Davis from 1946 until 21 July 1968. His duties involved, among other things, the installation of insulating material containing asbestos.

During the period 5 August 1968 through 6 September 1968 Self was employed by Armstrong Supply Corporation. From 9 September 1968 through 19 November 1968 he was employed by C. E. Thurston and Sons, Inc. From 21 November 1968 through 11 December 1968, Self was employed by Sprinkman and Sons Construction Company.

Approximately five years before his death Mr. Self began to have coughing spells. The coughing persisted. In July of 1968 Mr. Self consulted a doctor about his cough. The doctor made a preliminary diagnosis of asbestosis and referred Mr. Self to the Western North Carolina Sanatorium in Black Mountain, North Carolina, where there was a diagnosis of pulmonary asbestosis, Grade II. Mr. Self was found to be 50% disabled. The North Carolina State Board of Health reported this diagnosis to the Industrial Commission on 31 December 1968.

In January 1969 Mr. Self began complaining of severe headaches and his doctor referred him on 18 January 1969 to a neurosurgeon who diagnosed a brain tumor. Mr. Self was operated on for removal of the tumor on 21 January 1969. Microscopic examination revealed the tumor to be a "glioblastoma multiforme, which is the most malignant brain tumor which exists." The prognosis was that Mr. Self had from three to six months to live. There was no relation between the tumor and the asbestosis according to all of the evidence.

Mr. Self improved for several days following the operation then began to show signs of pulmonary insufficiency, lung congestion and pneumonitis. His condition deteriorated and more pulmonary congestion developed. Mr. Self ultimately died on 10 February 1969, less than one month from the operation, and without ever making any claim for asbestosis.

This claim was brought seeking compensation under the Workmen's Compensation Act for the death of Mr. Self. The

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Hearing Commissioner found that Mr. Self's death "was accelerated and contributed to by his asbestosis, and his death thus resulted from his asbestosis" and that his dependents were entitled to compensation from the appealing defendants only. The other defendants were dismissed as parties. The Full Commission affirmed the findings of fact and conclusions of law made by the Hearing Commissioner with a minor exception not involved in this appeal.

From the order of the Industrial Commission, the defendants appeal.

*Hayworth, Winfree & Marks by Herman Winfree for plaintiff appellees.*

*Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter and David M. Moore II for defendant appellants.*

CAMPBELL, Judge.

The defendants by appropriate assignments of error challenge the Commission's findings of fact and conclusions of law holding that plaintiff is entitled to compensation under the Workmen's Compensation Act for the death of Mr. Self.

The defendants contend that the evidence in this case does not support a finding that Mr. Self's death is compensable under the occupational disease provisions of the Workmen's Compensation Act.

At the hearing there was expert medical testimony to support the following, unexcepted to, findings:

"16. It was Dr. Ames' opinion that deceased's asbestosis made him more susceptible to pneumonia. It was further Dr. Ames' opinion that had it not been for the asbestosis and the lung complications deceased would have recovered from the surgery, would have been discharged from the hospital, and would have lived for a period of perhaps three or six months before death would have resulted from the tumor.

17. It was Dr. Ames' opinion that the immediate or primary cause of death was the malignant tumor and that deceased's pulmonary asbestosis contributed to his death."

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There was testimony that Mr. Self would not have died when he did but for the asbestosis and also that he would not have died when he did but for the brain tumor. It was established that there was no causal relation between the asbestosis and the brain tumor.

There was testimony that the brain tumor was the primary cause of death. The death certificate on Mr. Self listed a malignant brain tumor as the immediate or primary cause of death, and contributing to the death but not related to the cause was pulmonary asbestosis.

The question presented is whether under the North Carolina Workmen's Compensation Act compensation for death is proper where the evidence establishes "that the immediate or primary cause of death was the malignant tumor" and that asbestosis accelerated and contributed to the death but there was no causal relation between the tumor and the asbestosis. Stated another way, was the Commission correct in finding and holding that "death resulted from asbestosis within two years from the date of his last exposure to the hazards of asbestosis" based on evidence that asbestosis accelerated and contributed to the death but was not the immediate or the primary cause?

The North Carolina Workmen's Compensation Act makes special provision for employees exposed to the hazards of silicosis and asbestosis. G.S. 97-54 through 97-76. These provisions were enacted by the General Assembly in recognition of the peculiar nature of these diseases. *Honeycutt v. Asbestos Co.*, 235 N.C. 471, 70 S.E. 2d 426 (1952).

The particular statute involved in this case is G.S. 97-61.6. A review of this statute reveals that the pertinent part prior to 1965 read:

"Provided, however, should death result from asbestosis or silicosis within two years from the date of last exposure, or should death result within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to asbestosis or silicosis, either partial or total, then in either of these events, the employer shall pay, . . . "

This provision of the statute was construed in *Davis v. Granite Corporation*, 259 N.C. 672, 131 S.E. 2d 335 (1963).

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In the *Davis* case the employee had silicosis and was drawing compensation when he died of a heart disease. There was evidence to support a finding of fact that death was not caused by or related to silicosis. It was contended that no death benefits were payable because the death "was not caused by or related to silicosis." The Court held that the statute provided two conditions under which death benefits were payable. The first condition did not apply for the employee did not die of silicosis within two years of the date of his last exposure. The second condition did apply because he died within 350 weeks from the date of his last exposure and while drawing compensation for disability due to silicosis. The Court held that under the second condition there is no requirement that death result from silicosis. The Court went on to point out that the first condition was a general provision in keeping with the general purposes and provisions of the compensation act which makes compensable a death resulting from an incident arising out of and in the course of employment. The second provision, however, was deemed to be a special or particular provision, and therefore an exception to the general provision in keeping with the intention of the General Assembly. An award was upheld.

Following the *Davis* decision the statute was amended in 1965 to read:

"Provided, however, should death result from asbestosis or silicosis within two years from the date of last exposure, or should death result from asbestosis or silicosis, or from a secondary infection or diseases developing from asbestosis or silicosis within 350 weeks from the date of last exposure and while the employee is entitled to compensation for disablement due to asbestosis or silicosis, either partial or total, then in either of these events, the employer shall pay. . . ."

This was the statute as it existed at the time the instant case arose. By the amendment of 1965 the General Assembly indicated its intention to overrule the *Davis* decision and to allow death benefits from occupational diseases of asbestosis or silicosis only when death was related thereto so that the general purposes and provisions of the Compensation Act would be paramount and a compensable death would be a death resulting from this occupational disease arising out of and in the course of employment. There would no longer be a special or particular

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provision which would constitute an exception to a general provision.

We thus come back to the proposition as to what is meant by "death resulting from asbestosis." Does this mean that death must result solely and independently from all other causes from asbestosis or will a compensable death occur when the job-related asbestosis only accelerates and contributes to the death but is not the immediate or primary cause?

If we carry this idea alluded to in the *Davis* case one step further and treat asbestosis as being comparable to an injury arising out of and in the course of employment, how have the cases treated the injury situations where the injury was not the sole or direct cause of death but only accelerated and contributed to the death?

In the case of *Wyatt v. Sharp*, 239 N.C. 655, 80 S.E. 2d 762 (1954), the employee had a heart condition. While working as a carpenter on a scaffold, the scaffold fell so that the employee fell about six feet landing in a sitting position on a pile of dirt. It was found "that the shock and trauma of the fall . . . aggravated and accelerated the pre-existing heart condition so as to hasten the acute failure of the heart which occurred approximately 36 hours after the fall and which ultimately resulted in the death." A recovery was allowed.

The *Wyatt* case and other authorities indicate that injuries arising out of and in the course of employment which only accelerate and contribute to death caused primarily from non-related physical conditions nevertheless are compensable under the Workmen's Compensation Act. 100 C.J.S., Workmen's Compensation, § 521. 1 Larson's, Workmen's Compensation Law, § 12.20, pages 192.23 to 192.49.

While it is true that in the instant case the asbestosis did not aggravate the tumor and had no relation whatsoever to the tumor, nevertheless, it is the death which was accelerated and contributed to by the asbestosis, and this is the criterion rather than whether the tumor itself was aggravated and accelerated by the asbestosis.

We, therefore, conclude that the Commission reached the correct result. We feel strengthened in this conclusion that we are following the intention of the General Assembly by the fact

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that in 1971 G.S. 97-61.6 was further amended by the addition of another proviso reading:

“Provided further that if the employee has asbestosis or silicosis and dies from any other cause, the employer shall pay, . . . ”

Affirmed.

Judges BRITT and GRAHAM concur.

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STATE OF NORTH CAROLINA v. LENOUX GODWIN

No. 7212SC239

(Filed 29 March 1972)

**Narcotics § 5; Criminal Law § 138— possession of marijuana — punishment statute changed pending defendant's appeal**

A defendant whose appeal from conviction of possession of more than one gram of marijuana was pending on 1 January 1972, the effective date of the statute reducing that crime from a felony to a misdemeanor and reducing the maximum punishment for a first offense of possession of any quantity of marijuana to six months, is not entitled to the benefit of the new statute, since the legislature provided that “prosecutions” occurring prior to 1 January 1972 shall not be affected by the statutory changes, and “prosecution” is not limited to the trial but includes every step in a criminal action, from its commencement to its final determination by appellate review or until defendant begins to serve his sentence without pursuing an appeal or until the action is dismissed. This decision is contrary to the decisions of State v. McIntyre, 13 N.C. App. 479, and State v. Smith, 13 N.C. App. 583.

Judge HEDRICK concurring in part and dissenting in part.

ON *Certiorari* to review the judgment of *Bailey, Judge*, entered at the 14 June 1971 Session of Superior Court held in CUMBERLAND County.

The defendant was charged in a bill of indictment with the felonious possession of a narcotic drug, to wit: marijuana in excess of one gram, in violation of G.S. 90-88 (as it existed prior to 1 January 1972).

The State offered evidence tending to show that on 8 September 1970 Gerald A. Dominick, Special Agent with U. S.

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Customs, in the presence of R. B. Hewett, a Postal Inspector, and Sergeant DeCarter of the Inter-Agency Bureau of Narcotics and Dangerous Drugs, at the U. S. Post Office in Fayetteville, North Carolina, opened a locked, registered pouch containing a package addressed to Mr. James Burnett, Godwin, North Carolina, with a return address to Sergeant Lenoux Godwin, APO San Francisco. The package contained some stereo components. Inside one of the speakers, 264.6 grams of marijuana were found in a plastic bag wrapped in a towel. After dusting the towel and the plastic bag containing the marijuana with a fluorescent powder, the officers rewrapped the entire package, and on 9 September 1970 the package was delivered to the Post Office at Godwin, North Carolina. On 9 September 1970, the defendant picked up the package at the Post Office in Godwin, North Carolina, and took it to the home of James Burnett. Twenty minutes after the defendant entered the house, the officers entered and read a search warrant to the defendant. Twenty minutes thereafter, Mr. Burnett came to the house and the search warrant was read to him. The officers searched the house and found a stereo in the den with the same serial number as that on the stereo components in the package examined in the Post Office at Fayetteville. The towel containing the bag of marijuana was found in the fork of a tree behind Mr. Burnett's house. An ultraviolet light was shined on the defendant's hands and this test revealed the presence of the same fluorescent powder placed on the towel and the bag containing the marijuana.

The defendant offered no evidence.

The jury found the defendant guilty, and from a judgment imposing a prison sentence of four years, the defendant appealed.

*Attorney General Morgan, by Associate Attorney Edwin M. Speas, Jr., for the State.*

*Arthur L. Lane for defendant-appellant.*

BROCK, Judge.

The defendant assigns as error the court's denial of his motion for judgment as of nonsuit. There is ample evidence in the record to require the submission of this case to the jury.

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Based on 22 exceptions in the record, the defendant contends the court erred in allowing irrelevant, immaterial and prejudicial evidence to be introduced in the presence of the jury. We have examined each exception embraced within this assignment of error, and we conclude that all of the testimony complained of was relevant and material, and that the court did not commit prejudicial error in allowing the evidence to be introduced in the presence of the jury.

We have carefully examined all of the defendant's additional assignments of error and find them to be without merit.

In two opinions of this court, in cases involving convictions for possession of marijuana, the court *ex mero motu* reduced the sentences imposed by the trial judge. This was done on the theory that the maximum punishment provided by G.S. 90-95, effective 1 January 1972, was controlling. These two opinions are in *State v. McIntyre*, 13 N.C. App. 479, 186 S.E. 2d 207; and *State v. Smith*, 13 N.C. App. 583, 186 S.E. 2d 600.

Also in two opinions of this court, in cases involving convictions for possession of marijuana, the court made no changes in the sentences imposed by the trial judge. These two opinions are in *State v. Kistler*, 13 N.C. App. 431, 185 S.E. 2d 596; and *State v. Harvey*, 13 N.C. App. 433, 185 S.E. 2d 601.

Again in the present case we take no action upon the sentence of four years imposed by the trial judge. We do not agree with the reasoning of *State v. McIntyre*, *supra*, and *State v. Smith*, *supra*.

The rationale of *McIntyre* and *Smith* seems to be that G.S. 90-113.7(a) does not specifically mention punishment; therefore, it does not constitute a saving clause with respect to prior allowable punishment.

Also the rationale of *McIntyre* and *Smith* seems to infer that "prosecution" is limited and terminated at the "trial" stage of a criminal action and that only the "prosecution" (trial) is saved by G.S. 90-113.7. We think "prosecution" has a much broader meaning. A "prosecution" is the means adopted to bring a supposed offender to justice and punishment by due course of law, and consists of the series of proceedings from the time when the formal accusation is made by the filing of an affidavit or a bill of indictment or information in the criminal court

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until the proceedings are terminated. Words and Phrases, "Prosecution," Vol. 34A, p. 485. "Prosecution" is following up or carrying an action already commenced until the remedy be obtained, and, in criminal cases, is not complete until defendant begins to serve his sentence or the action is dismissed. See, *U. S. v. Gonware*, C.A. Cal., 415 F. 2d 82, 84. It is our opinion that "prosecution" includes every step in a criminal action, from its commencement to its final determination by appellate review or until defendant begins to serve his sentence without pursuing an appeal or until the action is dismissed.

The inference in *McIntyre* and *Smith* that "prosecution" is the equivalent of "trial" and that only the "prosecution" (trial) is saved by G.S. 90-113.7, would impel a determination that the legislature intended to amend G.S. 7A-272 so as to vest the Superior Courts with original jurisdiction to try misdemeanors in these possession of marijuana offenses arising before 1 January 1972. We do not think the legislature intended such a strained effect in either the restriction of the saving clause or the change in jurisdiction by inference.

"Frequently, statutes repealing statutes relating to crimes contain saving clauses as to crimes committed prior to the repeal. Where the repealing statute contains a saving clause as to crimes committed prior to the repeal, or as to pending prosecutions, the offender may be tried and punished under the old law. In such case, the crime is punishable under the old statute although no prosecution is pending at the time the new statute goes into effect." 50 Am. Jur., Statutes, § 572, p. 571.

G.S. 90-113.7(a), containing the saving clause, appears at the end of Article 5 known as the "North Carolina Controlled Substances Act." This is the normal placement of a saving clause when the legislature intends for it to refer to all of the preceding sections of the Article.

It appears to us that the legislature, as it had a right to do, specifically provided that the amendment to the punishment statute should not apply to persons who violated the law prior to 1 January 1972, regardless of when such person is tried or his appeal heard. G.S. 90-113.7 provides in section (a):

"Prosecutions for any violation of law occurring prior to January 1, 1972 shall not be affected by these repealers, or amendments, or abated by reason, thereof."

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To make the meaning doubly clear, the legislature went further and provided in the negative that the amended and rewritten Article shall apply only to violations of the law occurring after 1 January 1972. Section (d) of G.S. 90-113.7 provides:

“The provisions of this Article shall be applicable to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings, and investigations which occur following January 1, 1972.”

Even though the question of punishment has not been raised upon appeal, we agree that, if the maximum permissible punishment has been exceeded, the court should *ex mero motu* take some action to remedy the situation. However, we are of the opinion that the portions of the statute quoted above do not allow the benefits of the reduced sentence to persons who violated the law prior to 1 January 1972. This view is consistent with the opinions in *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 and *State v. Pardon*, 272 N.C. 72, 157 S.E. 2d 698. *Spencer* was concerned with an amendment to G.S. 20-174.1(b) which was not limited in its time of application. *Pardon* was concerned with an amendment to G.S. 14-335 which was not limited in its application.

We hold that defendant had a fair trial, free from prejudicial error, and that the sentence imposed is within the limits allowed by the applicable law.

No error.

Judge VAUGHN concurs.

Judge HEDRICK concurs in part and dissents in part.

Judge HEDRICK concurring in part and dissenting in part.

While the *prosecution* of the defendant for the violation of the narcotic laws occurring prior to 1 January 1972 was not affected by the 1971 Act, in my opinion the principles enunciated in *State v. Pardon*, 272 N.C. 72, 157 S.E. 2d 698 (1967), and followed in *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), *State v. McIntyre*, 13 N.C. App. 479, 186 S.E. 2d 207 (1972), and *State v. Smith*, 13 N.C. App. 583, 186 S.E. 2d 600 (1972), are controlling, and the defendant has been con-

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victed only of a misdemeanor. I vote to modify the judgment so as to reduce his sentence of imprisonment from four years to imprisonment for six months in the custody of the Commissioner of Corrections.

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**STATE OF NORTH CAROLINA v. JAMES ODELL McLAMB****No. 7210SC50****(Filed 29 March 1972)****1. Criminal Law § 122— instructions during jury's deliberations**

The trial court, in inquiring about the jury's progress during its deliberations, sufficiently instructed the jury that no juror should depart from any conscientious belief as to what the true facts might be in order to reach a verdict.

**2. Criminal Law § 126— polling the jury — questions by trial judge**

Where the record discloses that the first juror polled did not understand the question put to her by the clerk, the trial court did not err in questioning the juror to determine if the verdict returned by the foreman was her verdict and if she still assented thereto.

**3. Criminal Law § 66— in-court identification — pretrial photographic identification — failure to hold voir dire**

In this prosecution for common law robbery, the trial court did not commit prejudicial error in failing to conduct a voir dire examination of the prosecuting witness to determine whether his in-court identification of defendant was tainted by an out-of-court photographic identification, where the record shows that the in-court identification was of independent origin from the photographic identification, the witness having observed defendant from a distance of six to eight feet immediately after a moneybag was taken from him and, upon pursuit, having observed defendant's right and left facial profiles.

**4. Criminal Law § 87— photographic identification — leading question**

Where a robbery victim had testified that he picked defendant's picture out of a group of photographs shown to him by a policeman, the trial court did not abuse its discretion in allowing the solicitor to ask a leading question as to whether the policeman had at any time suggested the picture which he should pick.

**5. Criminal Law §§ 66, 99— court's question to prosecuting witness — expression of opinion**

The trial court did not express an opinion in asking the prosecuting witness, "What do you mean when you say you picked out this one picture," the question being asked merely to clarify the witness' testimony.

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**6. Criminal Law § 105— motion for nonsuit after State's evidence — waiver by introducing evidence**

When a defendant offers evidence after his motion for judgment of nonsuit is overruled, he thereby waives his right to urge that denial as error on appeal. G.S. 15-173.

Judge BROCK concurs in the result.

APPEAL by defendant from *Godwin, Judge*, 31 May 1971 Session of Superior Court held in WAKE County.

The defendant, James Odell McLamb, was charged in a bill of indictment, proper in form, with the felonious larceny of \$1,567.00 from O. S. McCauley on 30 May 1970. Upon the defendant's plea of not guilty, the State offered evidence tending to show that about 5:30 p.m., on 30 May 1970, O. S. McCauley locked approximately \$1,576.00, the receipts from his dry cleaning business, in a moneybag and went to the Fidelity Bank at the corner of Main and Raleigh Streets in the Town of Fuquay-Varina, North Carolina, to make a deposit. While Mr. McCauley was preparing to put the money in a night depository, someone pushed him from behind, grabbed the moneybag and ran. When McCauley turned around he saw the defendant six to eight feet away with the moneybag, running down the street. He chased the defendant down Main Street to where he turned into an alley. He pursued the defendant into the alley until he gave out of breath. McCauley talked to Chief of Police Young and described the person who had taken the moneybag and whom he had chased down the street.

On 19 June 1971, Chief Young took four photographs to McCauley's place of business and asked him if he recognized the person who had taken the money. From these photographs, McCauley picked out the defendant's picture.

The defendant testified and offered evidence that he was in Washington, D. C., from 16 May 1970 until about 6 June 1970.

The jury found the defendant guilty of felonious larceny, and from a judgment of imprisonment of ten years, the defendant appealed.

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*Attorney General Robert Morgan and Assistant Attorneys General William W. Melvin and William B. Ray for the State.*

*Bailey, Dixon, Wooten & McDonald by Wright T. Dixon, Jr., for defendant appellant.*

HEDRICK, Judge.

[1] The defendant argues that the court erred "in continuing to call the jury in for report on its progress without instructing that they were not to depart from any conscientious belief as to what the true facts might be." This contention is without merit. The record reveals the jury reported to the court on four occasions during its deliberations which covered a period of time in excess of four hours and twenty-four minutes. Three of these occasions related to whether the court would recess for the day. The fourth occasion related to the progress the jury was making in its deliberations. We have examined and find that all of the instructions given to the jury during its deliberations were in the form which has been many times approved by the appellate courts of this State. *State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767 (1966); *State v. Fuller*, 2 N.C. App. 204, 162 S.E. 2d 517 (1968).

[2] The defendant's 26th and 27th exceptions relate to the polling of the jury. The record discloses that the first juror polled did not understand the question put to her by the clerk. Upon inquiry by the court as to whether she fully understood the question and whether she had, in fact, agreed to the verdict as reported by the foreman, the juror stated that she did agree to the verdict and that she still assented thereto.

" . . . The polling of the jury is for one purpose only, to ascertain whether the verdict as returned is the verdict of each juror and whether he then assents thereto." *Highway Commission v. Privett*, 246 N.C. 501, 99 S.E. 2d 61 (1957).

We hold the court did not commit prejudicial error in questioning the juror to determine if the verdict returned by the foreman was her verdict and if she still assented thereto. *State v. Miller*, 268 N.C. 532, 151 S.E. 2d 47 (1966); *Trantham v. Furniture Co.*, 194 N.C. 615, 140 S.E. 300 (1927).

[3] The defendant next contends the court erred in refusing to allow a *voir dire* examination prior to the testimony of an

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eyewitness to the crime charged. After the witness McCauley had described the events leading up to, during, and immediately after the moneybag had been grabbed from him at the bank, the solicitor asked the following question: "State whether or not the person that you observed that grabbed the bag is in the court today." Over defendant's objection and after the judge had been informed at the bench that "identification was made from pictures," the witness was allowed to identify the defendant as the person who grabbed the bag and ran down the street.

In his brief, the defendant asserts "that the objection raised puts the case squarely under the holding of *State v. Moffitt*, 11 N.C. App. 337, 181 S.E. 2d 184." We do not agree. In *Moffitt* the court was concerned with the necessity of a *voir dire* examination before admitting into evidence out-of-court photographic identification. The exception here presents the question of whether the court committed prejudicial error by not conducting a *voir dire* examination of the witness *ex mero motu* to determine whether his in-court identification of the defendant was of independent origin and not tainted by the out-of-court photographic identification.

In *State v. Banner*, 279 N.C. 595, 184 S.E. 2d 257 (1971), Justice Higgins, writing for the Court, said:

" \* \* \* Both federal and state cases hold evidence of a prior identification will not invalidate the in-court identification unless the former was fundamentally unfair. The totality of the circumstances surrounding the prior identification will determine its admissibility at the trial. To remove the likelihood of a false identification is the purpose of the exclusionary rule. If the in-court identification is of independent origin, a prior confrontation of a suspect in the custody of the officers will not warrant excluding the identifying testimony. *Foster v. California*, 394 U.S. 440, 22 L.Ed. 2d 402; *State v. Austin*, 276 N.C. 391, 172 S.E. 2d 507, and cases therein cited."

At the trial the defendant did not object to the evidence of the out-of-court photographic identification. He does not contend that the photographic identification procedure was fundamentally unfair, or that it tended in any way to taint the in-court identification.

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In *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926, the United States Supreme Court said:

"Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified. \* \* \*

"We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun v. United States*, 371 U.S. 471, 488, 9 L.Ed. 2d 441, 455, 83 S.Ct. 407, "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, *Evidence of Guilt* 221 (1959).' \* \* \* Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. \* \* \*

"On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. \* \* \* We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error, *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, and for the District Court to reinstate the conviction or order a new trial, as may be proper."

On the record before us, we can make a determination that the in-court identification did have an independent origin. McCauley had ample opportunity to observe this defendant from a distance of six to eight feet immediately after the moneybag had been taken from him at the bank, and, upon pursuit, to see first his right and then his left facial profile. The witness' in-court identification of this defendant was positive. It had

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an origin independent of and prior to his observation of the photos at his place of business. *State v. Williams*, 279 N.C. 515, 184 S.E. 2d 282 (1971). This assignment of error is overruled.

The defendant contends the court committed prejudicial error in its instructions to the jury. We have carefully considered all the exceptions embraced in this assignment of error and conclude that the court fairly, adequately and correctly declared and explained the law arising on the evidence in the case, in accordance with the requirements of G.S. 1-180.

[4] The defendant contends the court erred in overruling his objection to the following question:

“Q. Did Chief Young at any time suggest which picture you should pick out?”

A. No, sir.”

When the question complained of was asked, the witness had already testified, without objection, in considerable detail, about having picked the defendant's picture out of a group of photographs shown to him at his place of business by Chief Young three weeks after the crime. Although the question may be leading, under the circumstances of this case we do not think the court abused its discretion in overruling the objection. 2 Strong, N. C. Index 2d, Criminal Law, § 87. This assignment of error is overruled.

[5] The defendant insists the judge expressed an opinion on the evidence, in violation of the provisions of G.S. 1-180, when he asked the witness McCauley the following question: “What do you mean when you say you picked out this one picture.” Immediately before the court asked the question complained of, the witness had testified: “He showed me 4 or 5 pictures. I don't know there was that many of them and I picked out this one picture.”

It is well settled in this State that the court can ask questions of the witness for the purpose of clarifying his testimony. *State v. Dunbar*, 8 N.C. App. 17, 173 S.E. 2d 543 (1970). Obviously, the question asked here was for the purpose of clarifying the witness' testimony and in no way amounted to an expression of an opinion.

[6] The defendant's final assignment of error challenges the ruling of the trial court denying the motion for judgment as

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of nonsuit made at the close of the State's evidence. When a defendant offers evidence after his motion for judgment as of nonsuit is overruled, he thereby waives all right to urge that denial as error upon appeal. G.S. 15-173; *State v. Prince*, 270 N.C. 769, 154 S.E. 2d 897 (1967); *State v. Fikes*, 270 N.C. 780, 155 S.E. 2d 277 (1967); *State v. Howell*, 261 N.C. 657, 135 S.E. 2d 625 (1964); *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971). Nevertheless, we have examined all of the evidence and conclude that it was sufficient to require the submission of the case to the jury.

We have carefully examined all the defendant's assignments of error and conclude the defendant had a fair trial free from prejudicial error.

No error.

Judge VAUGHN concurs.

Judge BROCK concurs in the result.

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STATE OF NORTH CAROLINA v. JAMES JACKSON BLALOCK

No. 7210SC225

(Filed 29 March 1972)

1. Criminal Law §§ 73, 131— hearsay evidence — competency to show state of mind

In a hearing on a motion for a new trial on the ground of newly discovered evidence wherein defendant introduced a statement signed by the prosecutrix repudiating her trial testimony that she had been raped by defendant, testimony by the prosecutrix that she had been told by defendant's witness after the trial that defendant and his co-defendant worked for the Mafia, that they would be after her because of her testimony at the trial, that she "wouldn't live" and that she "would die," that after the original trial she received numerous telephone calls in which the caller did not speak but merely breathed into the phone, and that someone had tried to break into her house, held competent as an exception to the hearsay rule to show the state of mind of the prosecutrix when she signed the statement.

2. Criminal Law § 131— new trial for newly discovered evidence

The granting of a new trial in a criminal case on the ground of newly discovered evidence rests in the sound discretion of the trial court. G.S. 15-174.

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**3. Criminal Law § 131— denial of new trial for newly discovered evidence — recantation of trial testimony**

The trial court did not err in the denial of defendant's motion for a new trial on the ground of newly discovered evidence where defendant introduced at the hearing a statement signed by the prosecutrix in which she recanted her trial testimony that she had been raped by defendant, but the prosecutrix repudiated her recantation on the witness stand and testified that she signed the statement because of threats, coercion, intimidation and harassment.

APPEAL by defendant from *Braswell, Judge*, 7 September 1971 Session of Superior Court held in WAKE County.

Defendant was tried at the 2 September 1969 Session of Superior Court held in Wake County on two bills of indictment, each charging him with the capital crime of rape. On the bill of indictment in which he was charged with raping one Suzanne Beam (Beam), he was convicted of the lesser included offense of an assault with intent to commit rape and was given a prison sentence of fifteen years. On the bill of indictment in which he was charged with raping one Patricia Ann Hinton (Hinton), he was convicted of an assault upon a female and was given a prison sentence of six months to begin at the expiration of the fifteen year sentence, and a fine of \$500.00.

From these convictions, he appealed to the Court of Appeals which found no error in his trial. See *State v. Blalock*, 9 N.C. App. 94, 175 S.E. 2d 716 (1970). Defendant's petitions for writ of certiorari were denied by the North Carolina Supreme Court on 28 August 1970 (277 N.C. 113) and by the United States Supreme Court on 22 February 1971 (401 U.S. 912, 27 L.Ed. 2d 812, 91 S.Ct. 881).

On 4 September 1970 defendant, with his co-defendant Meril Lane Andrews, filed a motion for a new trial on the grounds of newly discovered evidence. In his motion defendant asserted that Beam had made a recantation of her testimony given at his original trial and that this testimony had been crucial to the State's case and essential for a conviction.

On 15 July 1971 defendant filed what he entitles a "Supplement to Pending Motion for a New Trial for Newly Discovered Evidence," in which he asserted that the State had suppressed evidence "that was material and relevant to the credibility of the main State prosecuting witness, Beverly Suzanne Beam." In support of this supplemental motion, he

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alleged that he was held in jail without privilege of bond pending the trial of these capital felonies; that his attorney intentionally did not ask Beam about her prior criminal record because neither the defendant nor his attorney knew whether she had one; that Suzanne Beam had theretofore been convicted of crime and was on probation at the time; and that it was the solicitor's duty to bring out this fact when the defendants did not do so. The defendant further alleged that Beam committed perjury in testifying that she had not previously had an abortion performed.

The hearing on the motions was heard in the superior court in September 1971. The defendant and the State offered evidence.

The evidence for the defendant tended to show, among other things, that Beam and Hinton, the alleged victims in the original trial of the defendant for rape, each had signed a written recantation. Both of these persons had testified in substance at the original trial that the defendant had raped them. Defendant's Exhibit #1, written and signed by Beam, reads as follows:

"On my own accord, I would like to drop charges against the defendants, Buddy Andrews and Jackie Blalock, as of this date November 17, 1969.

Due to the confusion which occurred on that night, my mind was unstable, and I was very frightened and scared at that time. Buddy Andrews and Jackie Blalock did not attempt to rape me."

Beam, a witness for defendant (petitioner) at the hearing on this motion for a new trial, testified on cross-examination:

"The statement that has been introduced as defendants' Exhibit #1 which I identified is not true. I testified at the trial of these two defendants that both raped me. I testified at the trial that both of them raped me, had sexual intercourse with me—by force and against my will. That was true. The reason I signed the statement that has been introduced was I was very frightened. I was having phone calls. I had a Mr. Joe Ferrell to come over to my

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house one night. This was after the trial and before I signed the statement. And he told me that—

\* \* \*

He told me that because of my testimony at the trial that Andrews and Blalock would be after me; they worked for the Mafia; that I wouldn't live, that I would die and—I mean it was just one thing right after another they were telling me and it upset me terribly. He talked with Becky Blalock about this.

\* \* \*

Other things happened which entered into causing me to sign that statement, Defendants' Exhibit #1. I had some phone calls that—I have an unlisted number to begin with and only—and I was having these phone calls and they wouldn't say anything, they would stay on the phone and I could hear the breathing and hang up. I know that Becky Blalock did work for the telephone company at that time before she quit.

I don't know how many such telephone calls I had. It was just too many to count. There were several at night. In addition to the telephone calls there was another incident that caused me concern. Someone tried to break into my house."

Defendant's Exhibit #3 at the hearing was an affidavit executed by Hinton on 1 March 1971 before a Notary Public in the State of Minnesota. The pertinent parts of this affidavit read:

"2. That your affiant signed warrants against the defendants charging them with rape and testified at their trials that in fact defendants did have sexual intercourse with affiant against her will.

3. That in fact the defendants Blalock and Andrews did not have intercourse with affiant; that at no time did either Blalock or Andrews penetrate your affiant's private parts and at no time did either defendant attempt to penetrate the private parts of your affiant."

Defendant offered other evidence tending to show that Beam had not been threatened or coerced by anyone and that

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many men had had sexual intercourse with Beam, that Beam had made statements to one Cathy Mitchell and others that the defendant had not raped her, and also that Cathy Mitchell went to Minnesota and obtained the affidavit of Hinton.

The State offered evidence which in substance tended to show the following: The alleged victim Hinton at the time of the hearing was residing in Minnesota and, in a telephone conversation, had repudiated the affidavit signed by her and offered by the defendant. Cathy Mitchell had called the other alleged victim Beam so frequently requesting that she write a statement to the effect that she had not actually been raped by the defendant that Beam had stopped answering the telephone; furthermore, Cathy Mitchell had told her what to put in the statement and had offered her money. A friend of Cathy Mitchell had also offered Beam money, and one William Edward Pitchford had been offered a thousand dollars in August, 1970, by another party to try to get Beam "to drop the charges." The evidence for the State also tended to show that Cathy Mitchell had been instrumental in obtaining on behalf of the defendant an affidavit from one Steve Rudisill and a written statement from one Ronda Clark, both of which were repudiated at the hearing. Attorney Wade Smith, who testified as a defendant's witness, testified on cross-examination that he had formerly represented the defendant and that both Hinton and Joyce Rudisill, in talking to him, had on occasion repudiated the contents of their affidavits offered by the defendant.

In a judgment bearing the date of 16 September 1971 and covering sixteen pages of the record, Judge Braswell, after the plenary hearing and after making factual findings and drawing legal conclusions based on his findings, denied the "Supplement to Pending Motion for a New Trial for Newly Discovered Evidence," and after making further extensive findings of fact and conclusions of law, said:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion for a new trial on the ground of newly discovered evidence is denied and dismissed;

That there is no believable evidence entitling the defendants to a new trial, and therefore there is no evidence to support a new trial, and that beyond a reasonable doubt it would be a miscarriage of justice to allow a new trial."

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There also appears another order dated 16 September 1971 (covering about four pages of the record) in which, after making findings of fact and stating conclusions of law, Judge Braswell denied a petition filed by the defendant for a writ of habeas corpus and also denied defendant's motion in arrest of judgment.

The defendant gave notice of appeal to the Court of Appeals and filed an affidavit of indigency in which he requested that counsel be appointed for him, and counsel was appointed. Prior to this point in all of the proceedings, the defendant had been represented by privately retained counsel.

*Attorney General Morgan, Assistant Attorney General Satsky, and Associate Attorney Haskell for the State.*

*Garland B. Daniel for defendant appellant.*

MALLARD, Chief Judge.

[1] The defendant's first assignment of error is that the judge committed error in allowing defendant's witness Beam to testify that defendant's witness Joe Ferrell, after the original trial, had told her that defendant and his co-defendant Andrews worked for the Mafia and because of her testimony at the trial, they would be after her; that she "wouldn't live"; and that she "would die." Defendant contends that this was hearsay evidence and should have been excluded. Beam had just repudiated, on cross-examination, what had been stated by her in defendant's Exhibit #1 and was explaining why she had repudiated her written recantation. This evidence was competent for the purpose of showing the witness's state of mind at the time she signed the recantation offered by the defendant as his Exhibit #1. The rule is stated in 2 Strong, N. C. Index 2d, Criminal Law, § 73, p. 573, as follows:

"While testimony of extrajudicial assertions of a third person is incompetent to prove the truth of the facts asserted by such person, the hearsay rule does not preclude testimony of such assertions for the purpose of showing the state of mind of the witness in consequence of such assertions and not for the purpose of proving the matters asserted."

See also, *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969) and *State v. Black*, 230 N.C. 448, 53 S.E. 2d 443 (1949).

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Defendant's second assignment of error is that the judge committed error in admitting testimony by Beam that after the original trial, she received numerous telephone calls and when she answered, heard only a noise as if someone were "breathing" into the telephone, and also her testimony that someone tried to break into her house. The witness again was testifying as to her state of mind at the time she signed the recantation, and it was competent for her to do so. This assignment of error is overruled.

The defendant's third and last assignment of error is that the judge abused his discretion in his findings of fact, his conclusions of law, in signing the judgment, and in denying the motion for a new trial.

G.S. 15-174 reads as follows: "The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases." Motions for new trials for newly discovered evidence in civil cases are now controlled by the provisions of G.S. 1A-1, Rule 60(b)(2).

The prerequisite that must be established by the moving party to obtain a new trial on the grounds of newly discovered evidence has not been changed and is set forth in *State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931). The facts found do not meet these requirements.

[2, 3] The granting of a new trial in this criminal case on the grounds of newly discovered evidence rested within the sound discretion of the trial court. 7 Strong, N. C. Index 2d, Trial, § 49. No abuse of discretion has been shown. *Frye & Sons, Inc. v. Francis*, 242 N.C. 107, 86 S.E. 2d 790 (1955). The factual situation in the case of *State v. Ellers*, 234 N.C. 42, 65 S.E. 2d 503 (1951), relied on by the defendant, is distinguishable. There, the State's witness repudiated his testimony before judgment. Here, the State's witness repudiated her recantation on the witness stand. In the testimony at this hearing the alleged victim, explaining the repudiation of her recantation, told of threats, coercion, intimidation and harassment. The testimony of another witness indicated attempted bribery. The trial judge aptly said, "(T)his is a disgusting matter. It is rotten to the core."

We have carefully examined the record and hold that the material facts found by Judge Braswell are supported by com-

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petent evidence, that the material conclusions of law are based upon the facts so found, and that the facts found and conclusions of law support the judgment.

In the denial of the motion for a new trial on the ground of newly discovered evidence, we find no error.

Affirmed.

Judges MORRIS and PARKER concur.

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STATE OF NORTH CAROLINA v. MERIL LANE ANDREWS

No. 7210SC193

(Filed 29 March 1972)

APPEAL by defendant from *Braswell, Judge*, 30 August 1971 Session of Superior Court held in WAKE County. Defendant, along with his co-defendant James Jackson Blalock, was tried at the 2 September 1969 Session of Superior Court held in Wake County on two bills of indictment, each charging him with rape, a capital felony. On the bill of indictment in which he was charged with the rape of one Beverly Suzanne Beam (Beam), he was convicted of the lesser included offense of an assault with intent to commit rape and was given a prison sentence of fifteen years. On the bill of indictment in which he was charged with the rape of Patricia Ann Hinton (Hinton), he was convicted of the lesser included offense of an assault upon a female and was given a prison sentence of six months to begin at the expiration of the fifteen year sentence, and a fine of \$500 was imposed.

Defendant Andrews and his co-defendant Blalock appealed to the Court of Appeals which found no error in the trial. See *State v. Blalock* and *State v. Andrews*, 9 N.C. App. 94, 175 S.E. 2d 716 (1970). Defendant's petitions for writs of certiorari were denied by the North Carolina Supreme Court on 28 August 1970 (277 N.C. 113) and by the United States Supreme Court on 22 February 1971 (401 U.S. 912, 27 L.Ed. 2d 812, 91 S.Ct. 881). On 4 September 1970, defendant Andrews, with his co-defendant Blalock, filed a motion in the Superior Court of Wake County for a new trial on the grounds of newly dis-

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covered evidence. Further facts necessary to an understanding of this appeal are set forth in the opinion in number 7210SC225, *State v. James Jackson Blalock*, filed this date by Chief Judge Mallard.

*Attorney General Morgan, by Associate Attorney Haskell, for the State.*

*Carlos W. Murray, Jr. for the defendant.*

BROCK, Judge.

Defendant's assignments of error and arguments are basically the same in this appeal as they are in the separate appeal by James Jackson Blalock. It would serve no useful purpose to restate here what has already been clearly said by Chief Judge Mallard in the Blalock appeal.

For the reasons stated in the opinion in number 7210SC225, *State v. James Jackson Blalock*, filed this date, we hold that there is no error in the denial of defendant's motion for a new trial on the grounds of newly discovered evidence.

Affirmed.

Judges HEDRICK and VAUGHN concur.

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MATTIE S. WALL, HATTIE S. McINNIS, ALICE S. DOUGLAS, BERNICE UTLEY THOMPSON, JAMES ALLEN UTLEY, JAMES UTLEY, NORA U. LITTLE, MARGIE U. ERVIN, PETER UTLEY, JUANITA U. DAVIS, AND MAGALINE U. REID v. MADDIE SNEED, EXECUTRIX OF THE ESTATE OF ZOLLIE SNEED, DECEASED; MADDIE SNEED, INDIVIDUALLY; LOIS SNEED; HELEN SNEED; AND SOUTHERN NATIONAL BANK OF NORTH CAROLINA, ROCKINGHAM, NORTH CAROLINA

No. 7220SC49

(Filed 29 March 1972)

**1. Parties § 1; Rules of Civil Procedure § 19— action to impress parol trust — necessary parties**

In this action to have a parol trust impressed on property conveyed by a mother, now deceased, to her son allegedly with instructions to divide the property among her children who had not already been conveyed a portion of her lands, there is a fatal defect of parties

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where all of the children who had not already been conveyed a portion of the lands, or their heirs or devisees, were not made parties to the action. G.S. 1A-1, Rule 19.

**2. Parties § 1; Rules of Civil Procedure § 10— necessary parties**

Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined.

Judges BROCK and VAUGHN concur in the result.

APPEAL by plaintiffs from *Gambill, Judge*, 12 July 1971 Session of Superior Court held in RICHMOND County.

This is a civil action wherein plaintiffs seek to have a parol trust declared in their favor on lands claimed by the defendants. The record discloses the following:

1. Martha Jane Sneed died 1 April 1956, survived by the following children and grandchildren:

(a) Mary S. Utley, now deceased, who left the following children:

1. Dora Utley, now deceased, who left 2 children, Bernice Utley Thompson and James Allen Utley.

2. Lydia Ann Utley, now deceased, who left 1 child, James Utley.

3. Nora U. Little

4. Margie U. Ervin

5. Peter Utley

6. Juanita U. Davis

7. Magaline U. Reid

(b) Laura S. Covington

(c) Alice S. Douglas

(d) Wincie S. Ledbetter

(e) Calvin Sneed, who is now deceased, and left his widow, Flossie Sneed, and 2 children

(f) William Henry Sneed

(g) Lillie S. Watkins

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- (h) Bertha S. Barnes
- (i) Zollie Sneed
- (j) Mattie S. Wall
- (k) Hattie S. McInnis
- (l) Arvey Sneed

2. Prior to 22 August 1952, Martha Jane Sneed was the sole owner of a tract of land in Beaver Dam Township, Richmond County, containing 22.5 acres, more or less, referred to as Tract No. 2 of the Atlas Steele property.

3. Prior to 22 August 1952, Zollie Sneed and Wincie Sneed Ledbetter (two of Martha Jane Sneed's children) had been conveyed by separate deeds a portion each of the 22.5-acre tract referred to as Tract No. 2 of the Atlas Steele property, and on 22 August 1952 Martha Jane Sneed, widow, conveyed a portion of the 22.5-acre tract of land to her son Arvey Sneed.

4. On 22 August 1952, Martha Jane Sneed conveyed the balance of Tract No. 2 of the Atlas Steele property by warranty deed to her son, Zollie Sneed.

5. The plaintiffs, Mattie S. Wall, Hattie S. McInnis and Alice S. Douglas, are three of the children of Martha Jane Sneed who were never conveyed any of the property described in the complaint. The plaintiffs, Bernice Utley Thompson, James Allen Utley, James Utley, Nora U. Little, Margie U. Ervin, Peter Utley, Juanita U. Davis, and Magaline U. Reid, are children and grandchildren of Mary Sneed Utley, another child of Martha Jane Sneed who was not conveyed any of the property described in the complaint.

6. The defendants Maddie Sneed, individually, Lois Sneed, and Helen Sneed are the only devisees and beneficiaries under the will of Zollie Sneed, son of Martha Jane Sneed.

The plaintiffs in their complaint, in pertinent part, allege:

"7. That on August 22, 1952, Martha Jane Sneed, widow, executed and delivered to her son, Zollie Sneed, a Deed for the real property described in paragraph 6 above, with instructions to him, the said Zollie Sneed, her son, to divide said lands among her children who had not already been

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conveyed a portion of said lands, and even though said Deed appears to be a regular Warranty Deed on its face, said Deed actually conveyed said property to Zollie Sneed as Trustee for the remaining children of the said Martha Jane Sneed who had not theretofore been conveyed any of the property of the said Martha Jane Sneed, and since the said Martha Jane Sneed and her husband had already conveyed to Wincie Sneed Ledbetter her part of said lands, and Martha Jane Sneed had conveyed to Zollie Sneed his 2 acres, and Martha Jane Sneed had conveyed to her son, Arvey Sneed, his 2 acres, all of which said prior conveyances are listed as exceptions in the description of said property as set out in paragraph 6 hereof.

“8. That after the death of Martha Jane Sneed on April 1, 1956, the said Zollie Sneed, in an effort to carry out the instructions of his mother as imposed upon him as Trustee in said Deed from Martha Jane Sneed, widow, to Zollie Sneed, dated August 22, 1952, and recorded in Book 337 on page 20, Richmond County Registry, attempted to purchase the interest of all of his brothers and sisters in said tract of land conveyed to him by his mother, Martha Jane Sneed, and did in fact purchase and paid for the interest in said tract of land of the following persons, who were and are his full sisters, to wit: Laura S. Covington, the widow and children of his deceased brother, Calvin Sneed, Lillie S. Watkins, and Bertha S. Barnes, and in the case of Bertha S. Barnes, bought and paid for a 1-1/2 acre tract of land and gave it to her.”

The defendants admitted the execution and delivery of the deed dated 22 August 1952 from Martha Jane Sneed to Zollie Sneed, but denied all other allegations in the complaint as quoted above.

After a trial, the following issue was submitted to and answered by the jury as indicated:

“Did Martha Jane Sneed on August 22, 1952 convey by the deed recorded in Book 337, page 20 in the office of the Register of Deeds of Richmond County the land described in the Complaint to Zollie Sneed as trustee for her daughters, Mattie S. Wall, Hattie S. McInnis, Alice S. Douglas and others as alleged in the Amended Complaint?

Answer: No.”

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From a judgment entered on the verdict, the plaintiffs appealed.

*Pittman, Pittman & Pittman by William G. Pittman for plaintiff appellants.*

*Page and Page by John T. Page, Jr., for defendant appellees.*

HEDRICK, Judge.

In *Construction Co. v. Board of Education*, 278 N.C. 633, 180 S.E. 2d 818 (1971), Justice Lake quoted from the opinion of Justice Johnson in *Morganton v. Hutton & Bourbonnais Company*, 247 N.C. 666, 101 S.E. 2d 679 (1958), as follows:

“‘Whenever, as here, a fatal defect of parties is disclosed, the Court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the Court.’ See also: *Edmondson v. Henderson*, 246 N.C. 634, 99 S.E. 2d 869; *Peel v. Moore*, 244 N.C. 512, 94 S.E. 2d 491.”

[1] The record before us discloses that, in addition to the plaintiffs, five of Martha Jane Sneed's children, William Henry Sneed, Lillie S. Watkins, Bertha S. Barnes, Laura S. Covington and Calvin Sneed (now deceased, and survived by his widow, Flossie Sneed Melton, and his two children) did not receive any of their mother's property described in the complaint. The pleadings not only show that a controversy exists between the plaintiffs and the defendants as to whether Martha Jane Sneed conveyed the subject property to Zollie Sneed in trust for all of the children who had not received a share of the property, but they reveal that a controversy exists between the plaintiffs and the defendants as to whether Zollie Sneed actually purchased and paid for the interest of Watkins, Barnes, Covington and Calvin Sneed in and to the property. To further cloud the title to at least a portion of the property, it developed at the trial that Watkins, Barnes, Covington and the widow of Calvin Sneed, and others, had apparently, by a deed containing no warranties, dated 5 April 1971, conveyed all their right, title and interest to the subject property to Wenonia Ann Wall, a daughter of one of the plaintiffs. None of these four children,

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nor the widow or children of Calvin Sneed, nor Wenonia Ann Wall are joined as parties to this proceeding.

Rule 19(a) and (b) of the Rules of Civil Procedure provides:

“(a) *Necessary joinder*.—Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint. . . .

(b) *Joinder of parties not united in interest*.—The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.”

[2] “A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party.” *Garrett v. Rose*, 236 N.C. 299, 72 S.E. 2d 843 (1952). His interest must be such that no decree can be rendered which will not affect him. *Gaither Corp. v. Skinner*, 238 N.C. 254, 77 S.E. 2d 659 (1953). “The term ‘necessary parties’ embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. [Citation omitted.] A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined.” *Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E. 2d 390 (1951).

We hold that on this record it appears that Lillie Watkins, Bertha Barnes, Laura Covington, Flossie Sneed Melton, and her two children, widow and children of Calvin Sneed, and Wenonia Ann Wall have rights in the subject matter of this controversy which must be ascertained and settled before the rights of the

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present plaintiffs and defendants can be completely and finally adjudicated and determined.

With respect to William Henry Sneed, nothing appears in the pleadings raising any issue as to whether he sold any interest in the subject property to Zollie Sneed, nor did he join in the execution of the quitclaim deed dated 5 April 1971 to Wenonia Ann Wall. Although the court might properly proceed to adjudicate the diverse claims and interests of all the other parties without his joinder, it would appear desirable that he be made a party to the end that the title to the subject property might be adjudicated in one suit. *Wells v. Dickens*, 274 N.C. 203, 162 S.E. 2d 552 (1968); *Allred v. Smith*, 135 N.C. 443, 47 S.E. 597 (1904).

We have not overlooked or ignored the assignments of error relating to the application of G.S. 8-51, the "Dead Man's Statute." We cannot anticipate what circumstances may develop after the addition of new parties.

Without expressing any opinion as to the merits of the claims of any of the parties, joined or to be joined, the judgment entered is vacated and the case is remanded for such proceedings as the law directs and the rights of the parties require.

Vacated and remanded.

Judges BROCK and VAUGHN concur in the result.



ANALYTICAL INDEX



WORD AND PHRASE INDEX



# ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

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VENUE

WILLS  
WITNESSES

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### ABATEMENT AND REVIVAL

#### § 3. Abatement on Ground of Pendency of Prior Action

Pendency of a prior action between the same parties for the same cause of action in a federal district court of another state is not sufficient ground for dismissal of an action in a court of this State. *Lehrer v. Mfg. Co.*, 412.

### ACCOUNTS

#### § 1. Open and Running Accounts

Plaintiff's bookkeeper could testify as to the existence and amount of the account sued on. *Supply Co. v. Murphy*, 351.

In an action instituted by a supply company to recover on an account for building materials furnished to defendant, the evidence warranted submission of the case to the jury. *Ibid.*

### ACTIONS

#### § 2. Right of Nonresidents to Maintain Action in This State

Clerk of superior court had jurisdiction to enter an order requiring that a father residing in this State shall provide for the support of his children who were living in Bermuda and who had never been residents of the State. *Whitehead v. Whitehead*, 393.

### ANIMALS

#### § 2. Liability of Owner for Injuries Inflicted by Domestic Animal

Trial court erred in instructing the jury that before defendants could be found negligent in violating a municipal ordinance making it unlawful to keep a dog which habitually chases vehicles, the jury must find from the evidence that defendants knew or should have known that their dog was of the type described in the ordinance. *Gray v. Clark*, 160.

### APPEAL AND ERROR

#### § 4. Theory of Trial in Lower Court

Where a cause has been tried on one theory in the lower court, appellant cannot urge a different theory on appeal. *Johnson v. Tenuta & Co.*, 375.

#### § 6. Orders Appealable

An appeal from a purported pre-trial order is treated as a petition for certiorari by the Court of Appeals and is allowed. *Amodeo v. Beverly*, 244.

No appeal lies from interlocutory orders allowing petitioners' motion to strike portions of one respondent's answer and affirming the clerk's appointment of a guardian *ad litem* for another respondent. *Gardner v. Brady*, 647.

Interlocutory order allowing defendants' motions to strike portions of the complaint is not appealable. *Woods v. Enterprises*, 650.

#### § 7. Party Aggrieved

Plaintiff is not a party aggrieved by the trial court's order denying plaintiff's motion to strike defendant's answer and counterclaim made on the ground that a receiver has succeeded to all the rights and privileges of defendant. *Trust Co. v. Motors*, 632.

## APPEAL AND ERROR—Continued

## § 24. Assignments of Error in General

An assignment of error which attempts to present several propositions of law is broadside and ineffective. *Lancaster v. Smith*, 129.

## § 26. Exceptions and Assignments of Error to Judgment

An exception to the entry of judgment presents the single question whether the facts found by the court are sufficient to support the judgment. *College v. Thorne*, 27.

An exception to the judgment presents the face of the record for review, which includes whether the facts found or admitted support the judgment. *Supply Co. v. Murphy*, 351.

## § 28. Assignment of Error to Findings of Fact

General exception to the judgment and an assignment of error that the court erred in entering the findings of fact and signing the judgment do not bring up for review the finding of facts or the evidence on which they are based. *Sweet v. Martin*, 495.

## § 30. Exceptions and Assignments of Error to Evidence

Absent a proper exception to the findings, exceptions to the admission of evidence and to the denial of a motion for directed verdict are ineffectual. *Sweet v. Martin*, 495.

## § 36. Service of Case on Appeal

Only the judge who tried the case has authority to sign an order extending the time for serving the case on appeal. *Keyes v. Oil Co.*, 645.

## § 37. Agreement to Case on Appeal

Appeal is dismissed where counsel for appellees had not agreed to the statement of the case on appeal filed by appellant. *Lewter v. Herndon*, 242.

## § 39. Time of Docketing Appeal

Appeal is dismissed for failure to docket the record on appeal within 90 days after the date of the judgment. *Keyes v. Oil Co.*, 645.

An order extending the time within which to prepare the case on appeal did not extend the time for docketing the record on appeal. *Ibid.*

## § 40. Necessary Parts of Record Proper

The Court of Appeals dismisses an appeal from the denial of plaintiff's motion for a directed verdict, since neither the verdict nor the judgment was included in the record on appeal. *Mull v. Mull*, 154.

## § 41. Form and Requisites of Transcript

Appeal is subject to dismissal where the evidence is presented in the record in question and answer form. *Lancaster v. Smith*, 129.

Appeal is subject to dismissal where the filing dates of the pleadings and other documents are not shown in the record on appeal. *Carter v. Carter*, 648.

Appellant has the duty to see that the record is properly made up and transmitted. *Hill v. Hill*, 641.

Record on appeal was insufficient to enable the court to pass upon questions raised by appellant in appeal from award of child support and counsel fees pendente lite. *Ibid.*

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APPEAL AND ERROR—Continued

## § 44. Failure to File Brief

Appeal is dismissed where appellant failed to file a brief within the time allowed by the Rules. *Lewter v. Herndon*, 242.

## § 45. Failure to Discuss Exceptions and Assignments of Error in Brief

Appeal is subject to dismissal where defendant's brief contains no reference to his exceptions or assignments of error or to the pages of the record where they may be found. *S. v. Walters*, 497.

## § 54. Discretionary Matters

Where an order setting aside a verdict does not show whether it was made in the exercise of discretion or as a matter of law, it will be considered to have been made in the exercise of discretion. *Mull v. Mull*, 154.

## ARREST AND BAIL

## § 6. Resisting Arrest

State's evidence was sufficient for jury in prosecution for resisting arrest when officer arrested defendant at a hospital for disorderly conduct. *S. v. Summrell*, 1.

The trial court did not err in failing to charge that if the arrest was illegal defendant had the right to resist with such force as was reasonably necessary. *S. v. Fountain*, 107.

## § 9. Right to Bail

Defendant's contention that he was in effect denied bond because he was unable to get a bondsman to sign his bond since he was arrested on a *capias* for failure to appear after the warrant was served on the wrong man held without merit. *S. v. Able*, 365.

Trial court properly committed a juvenile to the temporary custody of the Board of Juvenile Corrections without privilege of bond pending disposition of his appeal. *S. v. Rush*, 539.

## § 11. Liabilities on Bail Bonds and Recognizances

Order entered by the district court *ex mero motu* revoking authority of appellants to engage in the bail bond business is null and void. *In re Wilson*, 151.

Clerk of court's certificate purporting to authorize the person named therein to execute bonds for criminal defendants in Dare County is null and void. *Ibid.*

## ASSAULT AND BATTERY

## § 5. Assault with a Deadly Weapon

An intent to kill may be inferred from the nature of the assault and the attendant circumstances. *S. v. Thacker*, 299.

## § 14. Sufficiency of Evidence

State's evidence was sufficient for jury in prosecution for assaulting an officer when the officer arrested defendant at a hospital for disorderly conduct. *S. v. Summrell*, 1.

Evidence was sufficient in prosecution for assaulting a police officer with a firearm from a hotel room. *S. v. Berry*, 310.

## ASSAULT AND BATTERY—Continued

## § 15. Instructions Generally

Trial court in felonious assault prosecution erred in failing to instruct jury on self-defense. *S. v. Broadnax*, 319.

## § 16. Instructions on Lesser Degrees of the Offense

In prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the trial court did not err in failing to instruct on lesser included felony of assault with a deadly weapon *per se* inflicting serious injury. *S. v. Thacker*, 299.

## § 17. Verdict and Punishment

Jury verdict was insufficient to find defendant guilty of felonious assault, but in effect found defendant guilty of an aggravated assault with a deadly weapon with intent to kill, a misdemeanor. *S. v. Robinson*, 628.

## AUTOMOBILES

## § 2. Suspension or Revocation of Driver's License

North Carolina provisions for suspension of automobile driver's license for failure to post security fully comply with constitutional requirements. *S. v. Martin*, 613.

Revocation of a driver's license for failure to post security may not be collaterally attacked in a prosecution for driving while license is revoked or suspended. *Ibid.*

## § 3. Driving After Suspension of License

Uniform Traffic Ticket used as a warrant sufficiently charged the offense of driving while license was suspended. *S. v. Brown*, 280.

In prosecution for drunken driving and driving while license was suspended, State's evidence was sufficient to show that defendant was driving the automobile. *Ibid.*

Warrant for driving while license was suspended is not fatally defective in failing to allege that defendant drove upon a "public" street or highway. *S. v. Martin*, 613.

## § 8. Attention to Road, Lookout and Due Care

One proceeding along a public highway must maintain a proper lookout and exercise due care to avoid colliding with vehicles entering the highway from private premises. *Davis v. Imes*, 521.

## § 17. Right Side of Road

Violation of the statute requiring motor vehicles to be driven on the right side of the highway is negligence *per se*. *Smith v. Kilburn*, 449.

## § 18. Entering Highway from Driveway

A motorist entering a public highway from a private driveway must yield the right-of-way. *Davis v. Imes*, 521.

## § 46. Opinion Testimony as to Speed

Trial court properly allowed a witness to give his opinion as to the speed of an automobile, notwithstanding the witness testified he did not have a chance to observe the automobile "for any length of time." *Davis v. Imes*, 521.

## AUTOMOBILES—Continued

## § 53. Failing to Stay on Right Side of Highway

Evidence that collision in question occurred when defendant's son drove left of the center of the highway made a *prima facie* case of actionable negligence. *White v. Vananda*, 19.

## § 57. Intersection Collision

Plaintiff's evidence was sufficient to be submitted to the jury against the drivers of two other automobiles in an action for damages resulting from an intersection collision. *Regan v. Player*, 593.

## § 62. Striking Pedestrian

Plaintiff's evidence was sufficient to support a jury finding that defendant was driving on the lefthand side of the street when he struck plaintiff's intestate. *Smith v. Kilburn*, 449.

## § 74. Contributory Negligence in Entering Highway

Plaintiff's evidence did not disclose that his intestate was contributorily negligent as a matter of law in entering the highway from a private driveway. *Davis v. Imes*, 521.

## § 80. Contributory Negligence in Turning

A motorist who attempted to make a U-turn at nighttime on a narrow highway and thereby blocked both lanes of travel was guilty of contributory negligence. *Riddick v. Whitaker*, 416.

## § 90. Instructions in Auto Accident Cases

Trial court's instructions on respective duties of a motorist entering a public highway from a private driveway and a motorist traveling on the public highway were confusing and erroneous. *Davis v. Imes*, 521.

Defendants were prejudiced by the court's failure to define proximate cause, including the element of foreseeability of injury. *Regan v. Player*, 593.

## § 94. Contributory Negligence of Passenger

Evidence that an automobile passenger knew of the driver's intoxication but continued to ride with him raises an issue of the passenger's contributory negligence. *Bryant v. Ballance*, 181.

## § 105. Sufficiency of Evidence on Issue of Respondent Superior

Plaintiff was entitled to have his case submitted to the jury where defendant admitted ownership of the automobile driven by his son and conceded that it was registered in his name. *White v. Vananda*, 19.

## § 108. Family Purpose Doctrine

The family purpose doctrine as enunciated in this State, rather than as declared in the state of defendant's residence, must be considered in determining if the doctrine is applicable to a collision which occurred in this State. *White v. Vananda*, 19.

The family purpose doctrine applies to an adult child as well as to a minor child. *Ibid.*

The fact that at the time of the collision defendant's son was serving in the armed forces and was not dependent upon his father for support does not as a matter of law exclude him from membership in his father's family within the meaning of the family purpose doctrine. *White v. Vananda*, 19.

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AUTOMOBILES—Continued

## § 125. Warrant for Operating Vehicle While Under the Influence

Uniform Traffic Ticket used as a warrant sufficiently charged the offense of driving under the influence. *S. v. Brown*, 280.

Warrant was sufficient to charge offense of driving a vehicle on a public parking lot while under the influence of intoxicants. *S. v. Brown*, 327.

## § 126. Competency of Evidence of Driving Under the Influence

Evidence of defendant's refusal to take a breathalyzer test was inadmissible in a June 1971 trial for driving on a public parking lot while under the influence of intoxicating liquor which occurred in October 1970. *S. v. Brown*, 327.

## § 127. Sufficiency of Evidence in Drunken Driving Prosecution

Trial court did not err in denial of defendant's motion for nonsuit with respect to the "second offense" portion of the charge of driving under the influence where it was stipulated that a driver's license record showed that a person having the same name as defendant was convicted of that crime in 1964, and defendant testified that "in 1964 there was a case of driving under the influence." *S. v. Fountain*, 107.

In prosecution for drunken driving and driving while license was suspended, State's evidence was sufficient to show that defendant was driving the automobile. *S. v. Brown*, 280.

State's evidence in a prosecution for drunken driving was sufficient to support a jury finding that defendant was the driver of an automobile stopped by police officer. *S. v. Wright*, 489.

## § 129. Instructions in Drunken Driving Prosecutions

Trial court properly instructed jury that a presumption of intoxication raised by a breathalyzer test result of .27 was merely a permissive inference of intoxication. *S. v. Robinette*, 224.

Trial court did not err in instructing jury that a person is under the influence of intoxicants when he has drunk a sufficient quantity to cause an appreciable "or noticeable" impairment of his mental or bodily faculties. *Ibid.*

Trial court's definition of "under the influence of intoxicating liquor" complied with the statute. *S. v. Combs*, 195.

## § 139. Engaging in Speed Competition on Highway

Uniform Traffic Ticket charging that defendant did unlawfully and wilfully "race" on a public highway held sufficient to charge the offense of wilfully engaging in speed competition on a public highway. *S. v. Turner*, 603.

Trial court did not err in failing to define for the jury the word "wilfully" and the phrase "speed competition." *Ibid.*

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BANKS AND BANKING

## § 10. Liability in General

Action against a national banking association may be brought in the county where the branch which transacted the business complained of is located. *Security Mills v. Trust Co.*, 332.

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**BASTARDS****§ 2. Warrant and Indictment**

Warrant was sufficient to charge offense of willful failure to support illegitimate child. *S. v. Fidler*, 626.

**BURGLARY AND UNLAWFUL BREAKINGS****§ 1. Elements of Burglary**

In a prosecution for burglary or felonious breaking, the intent to commit larceny may be inferred from the circumstances of the crime. *S. v. Accor*, 10.

**§ 4. Competency of Evidence**

In a prosecution for breaking and entering, trial court did not err in the admission of evidence that defendant had a loaded shotgun in the automobile in which he attempted to escape. *S. v. Oliver*, 184.

**§ 5. Sufficiency of Evidence**

State's evidence was sufficient for jury in this prosecution for felonious breaking and entering of a grocery store. *S. v. Crawford*, 146; *S. v. Oliver*, 184.

Evidence was sufficient to support finding that defendants broke and entered a home with intent to commit larceny therein, notwithstanding defendants had no opportunity to steal any property because they were immediately apprehended. *S. v. Perry*, 304.

State's evidence, including fingerprint evidence, was sufficient for the jury in prosecution for breaking and entering and larceny. *S. v. Kilian*, 340.

State offered sufficient evidence of identification of defendants to sustain their conviction of felonious breaking and entering. *S. v. Woody*, 249.

**§ 7. Verdict and Instructions as to Possible Verdicts**

In a prosecution for first degree burglary, it was proper for the trial court to instruct the jury that they could also return a verdict of guilty of felonious breaking and entering. *S. v. Accor*, 10.

**§ 10. Prosecutions for Possessing Housebreaking Implements**

Defendant's plea of guilty of unlawful possession of burglary tools precluded defendant from contending on appeal that the items listed in the indictment were not "implements of housebreaking" and that he had a lawful excuse to have them in his possession. *S. v. Cadora*, 176.

State's evidence was sufficient for jury in prosecution for unlawful possession of implements of housebreaking. *S. v. Stockton*, 287.

**CARRIERS****§ 2. State License and Franchise, and Petitions to Increase Service**

Evidence was sufficient to support Utilities Commission's amendment of a rule applicable to carriers of liquid petroleum in bulk in tank trucks by redefining "petroleum products." *Utilities Comm. v. Petroleum Carriers*, 554.

Statutes declaring it to be State policy to cooperate with national transportation policy do not require the Utilities Commission to adopt rules of the ICC. *Ibid.*

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CARRIERS—Continued

In a hearing upon a proposed amendment to the Commission's rule defining "petroleum products," notice of the hearing with an attached copy of the proposed amendment constituted sufficient notice to carriers who did not participate in the hearing of the entry of an order amending the rule in a more restrictive manner than the amendment proposed and attached to the notice. *Ibid.*

## CLERKS OF COURT

## § 1. Jurisdiction and Authority

Clerk of court's certificate purporting to authorize the person named therein to execute bonds for criminal defendants in Dare County is null and void. *In re Wilson*, 151.

## CONSTITUTIONAL LAW

## § 6. Legislative Powers

The General Assembly has the power to provide that the proof of one fact shall be deemed *prima facie* evidence of a second fact. *S. v. Lassiter*, 292.

## § 24. Requisites of Due Process

Notice and hearing are essential to due process of law. *In re Wilson*, 151.

## § 29. Right to Trial by Duly Constituted Jury

Trial court did not err in exclusion of prospective jurors who stated they could never return a verdict requiring the death penalty. *S. v. Watson*, 54.

## § 30. Due Process in Trial

A delay of 47 days from the date of the offense to the issuance of the warrant did not violate defendant's right to a speedy trial. *S. v. Farris*, 143.

A 10 months' delay between defendant's arrest and trial did not violate defendant's right to a speedy trial. *S. v. Spencer*, 112.

Defendant was not denied his right to a speedy trial by delay of 21 months between the issuance and execution of a warrant charging him with murder and his trial on that charge. *S. v. Watson*, 54.

A delay of three years between defendant's trial in recorder's court and his trial *de novo* in superior court did not violate his right to a speedy trial. *S. v. Harrell*, 243.

Defendant was not denied his constitutional right to a speedy trial by a delay of some 17 months between his arrest and trial, during which the State had been granted four continuances. *S. v. Berry*, 310.

Defendant was not denied the constitutional right to a speedy trial on charges of forgery and uttering a forged check by a delay of more than 10 months between the commission of the crimes and the issuance of a warrant charging defendant with the crimes. *S. v. Bauguess*, 457.

## § 31. Right of Confrontation and Access to Evidence

An indigent defendant in a homicide case was not entitled to a daily transcript of the testimony during trial. *S. v. Rich*, 60.

## CONSTITUTIONAL LAW—Continued

Defendant on trial for non-capital felony waived his right to be present during trial and rendition of the verdict by voluntarily absenting himself after the first day of the trial. *S. v. Stockton*, 287.

A sentence imposing corporal punishment for any crime may not be pronounced against a defendant in his absence. *Ibid.*

Trial court did not err in refusing to compel the State to disclose the identity of a confidential informant. *S. v. Perry*, 304; *S. v. Johnson*, 323; *S. v. Daye*, 435.

## § 32. Right to Counsel

District court did not err in refusing to appoint counsel to represent defendant at a preliminary hearing on the ground that defendant was not an indigent, notwithstanding superior court subsequently found that defendant was an indigent and appointed counsel to represent her in her trial in superior court. *S. v. Cradle*, 120.

A condition of probation requiring the defendant to reimburse the State for cost of court-appointed counsel does not infringe defendant's constitutional right to counsel. *S. v. Foust*, 382.

An indigent defendant who waived a preliminary hearing at a time when he was not represented by counsel failed to show that he was prejudiced by the absence of counsel. *S. v. Elledge*, 462.

## § 33. Self-Incrimination

In prosecution for unlawful possession of heroin, trial court did not err in permitting defendant's witness, who was under indictment for transporting the heroin defendant was accused of possessing, to refuse to answer certain questions on the ground of his privilege against self-incrimination, notwithstanding his answers would not in themselves subject him to criminal prosecution. *S. v. Smith*, 46.

A defendant who, after he had entered a guilty plea but before sentence of imprisonment had been imposed, was required to testify as a State's witness in the trial of another defendant for the same crimes to which defendant had pleaded guilty is held not deprived of his right against self-incrimination. *S. v. Elledge*, 462.

## CONTEMPT OF COURT

## § 6. Findings and Judgment

Trial judge's order finding newspaper photographers guilty of direct contempt of court is invalid on the ground that the order was rendered after the expiration of the session of court at which the contempt hearing was held. *In re Martin*, 158.

## CONTRACTS

## § 7. Contracts in Restraint of Trade

Stated consideration for a covenant not to compete in employment contracts executed by defendants after they had been employed by plaintiff as salesmen for some time—the initiation of a profit sharing plan for all employees—was illusory as to defendants, and the covenants were unenforceable. *Wilmar, Inc. v. Liles*, 71.

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CONTRACTS—Continued

## § 18. Abandonment or Waiver

Abandonment or waiver of rights under an option contract may be inferred only from positive and unequivocal acts which are clearly inconsistent with the contract. *Hayes v. Griffin*, 606.

## § 23. Waiver of Breach

The defective condition of an underground drainpipe was a latent defect which was not waived by plaintiffs' acceptance of work done under a construction contract. *Tisdale v. Elliott*, 598.

## § 25. Pleadings

Plaintiff's complaint stated a claim for relief for breach of contract which gave plaintiff the right to sell distributorships in defendant's organization. *Mills v. Koscot Interplanetary*, 681.

## § 26. Competency of Evidence

In an action to recover damages for breach of a contract to construct a house, the parol evidence rule was not violated by admission of evidence of the condition of the house after its acceptance by plaintiffs. *Tisdale v. Elliott*, 598.

## § 27. Sufficiency of Evidence

Where plaintiff's evidence shows a contract and an act by defendant rendering it impossible for plaintiff to perform his part of the agreement, a *prima facie* case of breach of contract has been made out. *Mills v. Koscot Interplanetary*, 681.

Plaintiff's evidence was sufficient for the jury in an action for breach of a contract giving plaintiff a right to sell distributorships in defendant's organization. *Ibid.*

## CONVICTS AND PRISONERS

## § 2. Discipline and Management

Prison records are confidential and are not subject to inspection by the public or by the inmate involved. *Goble v. Bounds*, 579.

Decisions relating to honor grade status and work release are discretionary and not subject to procedural due process. *Ibid.*

## COURTS

## § 15. Criminal Jurisdiction of Juvenile Court

Juvenile proceedings must be regarded as criminal for Fifth Amendment purposes of the privilege against self-incrimination. *S. v. Rush*, 539.

## CRIMINAL LAW

## § 9. Aiders and Abettors

Trial court did not err in failing to instruct the jury on the principles of aiding and abetting. *S. v. Crawford*, 146.

## § 15. Venue

Defendants failed to show that unfavorable pretrial publicity warranted a change of venue. *S. v. Brown*, 261.

## CRIMINAL LAW—Continued

Trial court did not abuse its discretion in denial of defendant's motion for change of venue or a special venire made on ground of pretrial publicity of the crime and of the escape from jail by defendant's companions. *S. v. Brown*, 315.

**§ 18. Jurisdiction on Appeals to Superior Court**

An appeal to the superior court from a conviction in the district court gives the superior court the jurisdiction to sentence defendant upon a plea of guilty to a misdemeanor. *S. v. Rowland*, 253.

**§ 21. Preliminary Proceedings**

Trial court's refusal to order the sequestration of the State's witnesses during the preliminary hearing was properly within its discretion. *S. v. Accor*, 10.

Fact that defendant was never served with a warrant but was arrested on a *capias* for failure to appear for trial did not affect the validity of defendant's trial on an indictment. *S. v. Able*, 365.

An indigent defendant who waived a preliminary hearing at a time when he was not represented by counsel failed to show that he was prejudiced by the absence of counsel. *S. v. Elledge*, 462.

**§ 23. Plea of Guilty**

Defendant's guilty pleas were not rendered invalid by the fact defendant was taking a tranquilizer called Thorazine, where defendant admitted to the judge that his ability to reason and understand was not affected. *S. v. Ellis*, 163.

Defendant's plea of guilty of unlawful possession of burglary tools precluded defendant from contending on appeal that the items listed in the indictment were not "implements of housebreaking" and that he had a lawful excuse to have them in his possession. *S. v. Cadora*, 176.

Appeal from plea of guilty presents only face of record proper for review. *S. v. Phillips*, 226.

Record must affirmatively show that defendant was aware of the consequences of his pleas of guilty and that the pleas were voluntarily and understandingly made. *S. v. Vanderburg*, 248.

Motion to be allowed to withdraw a guilty plea is addressed to the discretion of the court. *S. v. Elledge*, 462.

Defendant's guilty pleas were not invalidated by the fact that he had earlier waived a preliminary hearing without the presence of counsel. *Ibid.*

The record on appeal sufficiently showed that defendant's plea of guilty was voluntarily and understandingly entered. *S. v. Fidler*, 626.

**§ 25. Plea of Nolo Contendere**

No error appears on the face of the record proper in appeal from plea of *nolo contendere*. *S. v. Ford*, 34.

**§ 26. Plea of Former Jeopardy**

Superior court properly refused to quash on the ground of double jeopardy indictments which were inadvertently sent to the grand jury when defendants appealed from district court convictions, where the State did not proceed in superior court under the indictments but tried defendants upon the warrants on which they were tried in the district court. *S. v. Truesdale*, 622.

## CRIMINAL LAW—Continued

## § 33. Facts in Issue and Relevant to Issue

In a prosecution for breaking and entering, trial court did not err in the admission of evidence that defendant had a loaded shotgun in the automobile in which he attempted to escape from the crime scene. *S. v. Oliver*, 184.

Statement made by a witness contemporaneously with defendant's escape from the scene of the crime that defendant was getting into a waiting car was competent as part of the *res gestae*. *S. v. McKinney*, 214.

## § 34. Evidence of Defendant's Guilt of Other Offenses

Where defendant testified on cross-examination that he did not know how many times he had been convicted of assault, solicitor properly questioned defendant about specific previous convictions. *S. v. Redfern*, 230.

Evidence that a confidential informant had purchased marijuana from defendant two weeks prior to the date of possession alleged in the indictment was competent to show defendant's intent and knowledge. *S. v. Johnson*, 323.

## § 36.1. Evidence of Alibi

Although trial court's instructions on alibi failed to charge the jury to consider the evidence of alibi together with all other evidence in the case, the charge, when taken as a whole, sufficiently instructed the jury that their verdict should be based on all the evidence. *S. v. Humphrey*, 138.

## § 42. Articles Connected with the Crime

It was not prejudicial to admit in evidence a receipt for a telegraph money order from defendant to an address in California, there being evidence a package of marijuana was mailed to defendant from the California address. *S. v. Kistler*, 431.

## § 43. Photographs

Defendant was not entitled to the use of photographs during his cross-examination of the State's witness, the photographs never having been introduced in evidence. *S. v. Rich*, 60.

Two mug shot photographs of defendant were properly admitted for illustrative purposes. *S. v. Brown*, 315.

Photographs of defendants charged with receiving stolen property were properly admitted for illustrative purposes. *S. v. Truesdale*, 622.

## § 46. Flight of Defendant as Implied Admission

The erroneous admission of hearsay testimony relating to defendant's plans for flight was not prejudicial in this robbery prosecution. *S. v. Humphrey*, 138.

## § 50. Expert and Opinion Testimony

Trial court properly permitted police officer to state his opinion that a substance purchased by a confidential informant was marijuana. *S. v. Johnson*, 323.

Evidence of chain of possession of glassine bags found in defendant's apartment was sufficient to permit an expert to testify that the bags contained heroin. *S. v. Williams*, 423.

## CRIMINAL LAW—Continued

## § 51. Qualification of Experts

In absence of a request, record need not show a specific finding as to the qualification of a witness as an expert. *S. v. Johnson*, 323.

## § 55. Blood Tests

Trial court properly instructed jury that a presumption of intoxication raised by a breathalyzer test result of .27 was merely a permissive inference of intoxication. *S. v. Robinette*, 224.

## § 64. Evidence as to Intoxication

Evidence of defendant's refusal to take a breathalyzer test was inadmissible in a June 1971 trial for driving on a public parking lot while under the influence of intoxicating liquor which occurred in October 1970. *S. v. Brown*, 327.

## § 66. Evidence of Identity by Sight

Trial court properly found that the identification of defendants as the perpetrators of first degree burglary arose out of the witnesses' observations of defendants during the burglary and not from illegal photographic identification. *S. v. Accor*, 10.

Pretrial photographic procedure was not unnecessarily suggestive, and in-court identification was properly admitted. *S. v. Little*, 228.

State's evidence was sufficient to show that defendant was driver of the getaway car. *S. v. Perry*, 304; *S. v. Brown*, 315.

Assault victims' in-court identifications were based upon what they observed at the crime scene and were not tainted by a one-man lineup conducted in a hospital emergency room. *S. v. Thacker*, 299.

Trial court did not abuse its discretion in allowing solicitor to ask assault victims leading questions as to whether they were basing their in-court identifications of defendant on what they saw at the crime scene or what they saw at a one-man lineup. *Ibid.*

Trial court did not commit prejudicial error in failing to conduct a voir dire examination of a robbery victim to determine whether his in-court identification of defendant was tainted by an out-of-court photographic identification. *S. v. McLamb*, 705.

## § 71. Short-Hand Statement of Fact

Trial court did not err in allowing a police officer to testify that defendant was "talking very loud and boisterous." *S. v. Summrell*, 1.

Testimony by police officers that they went to defendant's "residence" to execute a search warrant is competent as a shorthand statement of fact. *S. v. Williams*, 423.

Testimony that a witness observed "scuffle marks" at the scene of an alleged rape was competent as a shorthand statement of fact. *S. v. Davis*, 492.

## § 73. Hearsay Testimony

Hearsay evidence defined. *S. v. Humphrey*, 138.

In a hearing on a motion for a new trial on the ground of newly discovered evidence, testimony by the prosecutrix was competent as an exception to the hearsay rule to show her state of mind when she signed a statement repudiating her trial testimony that she had been raped by defendant. *S. v. Blalock*, 711.

## CRIMINAL LAW—Continued

## § 75. Test of Voluntariness of Confession and Admissibility

Trial court erred in admitting defendant's in-custody statements made in 1970 in the absence of counsel without making findings as to whether defendant was an indigent at the time of the interrogation and, if indigent, whether defendant signed a written waiver of counsel. *S. v. Cannady*, 240; *S. v. Outen*, 246.

While admission of in-custody confession made by indigent defendant in March 1971 when he was not represented by counsel and had not executed written waiver of counsel was erroneous, the error was harmless beyond a reasonable doubt. *S. v. Thacker*, 299.

Trial court properly admitted testimony that after heroin was discovered in defendant's apartment defendant stated, "That's all. There's not anymore." *S. v. Williams*, 423.

## § 77. Admissions and Declarations

Trial court did not err in denial of defendant's motion "to see any and all exculpatory statements which the State had." *S. v. Summrell*, 1.

Evidence sought to be elicited on cross-examination that defendant had told a witness that he had paid the prosecutrix \$4.00 to have relations with her was properly excluded as a self-serving declaration. *S. v. Davis*, 492.

## § 80. Records

Certified copy of the victim's death certificate was properly admitted for the purpose of proving the time, place and cause of death. *S. v. Watson*, 54.

## § 83. Competency of Husband or Wife to Testify For or Against Spouse

In a joint trial of a husband and wife for felonious larceny, it was proper to admit the husband's extrajudicial, inculpatory statement where the statement neither implicated the wife nor violated the privileged communication rule of G.S. 8-57. *S. v. Mathis*, 359.

## § 84. Evidence Obtained by Unlawful Means

There was no search when a police officer investigating a traffic accident opened the right side door of a van and saw in plain view a person holding a bag of marijuana in his hand; consequently it was lawful for the officer to seize the marijuana. *S. v. Fry*, 39.

Defendant had no standing to object to the illegal search of an apartment rented by a female friend of defendant, notwithstanding defendant stayed overnight in the apartment three or four nights a week and had been given permission to use the apartment whenever he pleased. *S. v. Nickerson*, 125.

On officer who entered defendant's home to serve a valid arrest warrant could lawfully seize a quantity of marijuana which was in plain view. *S. v. Harvey*, 433.

## § 87. Direct Examination of Witnesses

Trial court did not abuse its discretion in allowing solicitor to ask assault victims leading questions as to whether they were basing their in-court identifications of defendant on what they saw at the crime scene or what they saw at a one-man lineup. *S. v. Thacker*, 299.

Trial court properly permitted the solicitor to ask leading questions of a 7-year-old witness. *S. v. Williams*, 619.

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CRIMINAL LAW—Continued

Trial court did not abuse its discretion in allowing the solicitor to ask a policeman leading questions as to whether he had suggested which photograph a robbery victim should pick from a group of photographs. *S. v. McLamb*, 705.

**§ 88. Cross-Examination**

In prosecution for disorderly conduct, resisting arrest and assault, trial court did not err in refusing to allow a defendant to cross-examine the arresting officer as to whether he had been involved in a scuffle at the jail, how many times he had been married, and whether he had visited a mental health clinic. *S. v. Summrell*, 1.

**§ 89. Credibility of Witnesses; Corroboration and Impeachment**

Where the State's witness made positive visual identification of defendant during the trial, it was proper for the trial court to prohibit defendant from cross-examining the witness with respect to the issuance of a warrant for the arrest of an innocent person during the course of the same investigation which led to the present charge against defendant. *S. v. Farris*, 143.

Testimony by a State's witness that a prior witness had told him at the crime scene "that the defendant was down there getting into a car" was properly admitted for the purpose of corroborating the testimony of the prior witness. *S. v. McKinney*, 214.

Statement of a witness made prior to trial can be considered as bearing upon a witness' credibility. *S. v. Terry*, 355.

**§ 91. Continuance of Trial**

Trial court did not err in denial of defendant's motion for a continuance of her trial where counsel had been appointed six days before trial. *S. v. Cradle*, 120.

Trial court did not err in denial of motion for continuance made on ground of missing witness where witness was located during trial and testified for defendant. *S. v. Williams*, 233.

Trial court did not abuse its discretion in denial of defendant's motion for continuance based upon defendant's unsupported statement that private counsel he had employed had left the State. *S. v. Fidler*, 626.

**§ 92. Consolidation of Counts**

The fact that the judge's order of consolidation deprived defendant from making the closing argument to the jury held not prejudicial. *S. v. Brown*, 261.

**§ 95. Admission of Evidence Competent for Restricted Purpose**

In a joint trial of a husband and wife for felonious larceny, it was proper to admit the husband's extrajudicial, inculpatory statement where the statement neither implicated the wife nor violated the privileged communication rule of G.S. 8-57. *S. v. Mathis*, 359.

**§ 98. Custody of Witnesses**

Trial court's refusal to order the sequestration of the State's witnesses during the preliminary hearing was properly within its discretion. *S. v. Accor*, 10.

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CRIMINAL LAW—Continued**§ 99. Expression of Opinion on Evidence During Trial**

Trial court's questioning of SBI agents concerning their handling of an exhibit in a narcotics case was not an expression of opinion. *S. v. Hood*, 170.

Trial judge may ask clarifying questions of a witness. *S. v. Best*, 204.

Statute prohibiting the court from giving an opinion on the evidence does not apply in a juvenile delinquency proceeding. *S. v. Rush*, 539.

Trial court did not express an opinion in asking the prosecuting witness, "What do you mean when you say you picked out this one picture?" *S. v. McLamb*, 705.

**§ 101. Conduct of Jury and Misconduct Affecting Jury**

The fact that a prospective juror had heard of defendants' escape from jail did not warrant a mistrial in defendants' trial for armed robbery. *S. v. Brown*, 261.

The fact that a juror made an unauthorized visit to the scene of the crime did not entitle defendant to a new trial, and the trial judge acted within his discretion in thereafter ordering a view of the scene by the entire jury. *S. v. Smith*, 583.

Trial court did not err in failing to instruct the jury that evidence obtained by viewing scene of defendant's arrest should be considered illustrative evidence. *Ibid.*

**§ 102. Argument and Conduct of Solicitor**

Portion of the solicitor's argument which referred to the defendant as a "young animal," although disapproved, was not prejudicial. *S. v. Brown*, 261.

Portion of the solicitor's argument "If they [defendants] weren't guilty why were they up here anyway after the preliminary hearing where probable cause was found?" held not prejudicial within the context of this particular case. *Ibid.*

Any prejudice in the solicitor's comment upon defendant's failure to bring in as witnesses eight persons who were present at the time of his arrest was nullified by the court's instructions. *S. v. Smith*, 583.

**§ 104. Consideration of Evidence on Motion to Nonsuit**

On the question of nonsuit in a homicide prosecution it was immaterial that the trial testimony of the State's chief witness was inconsistent with his testimony at the preliminary hearing. *S. v. Terry*, 355.

**§ 105. Necessity for Motion to Nonsuit and Renewal Thereof**

By introducing evidence, defendant waived his motion for nonsuit made at the close of the State's evidence. *S. v. Sallie*, 499.

**§ 112. Instructions on Burden of Proof and Presumptions**

Trial court did not commit prejudicial error in defining reasonable doubt as a "possibility of innocence." *S. v. Perry*, 304.

**§ 113. Statement of Evidence and Application of Law Thereto**

Defendant could not complain of the trial judge's recapitulation of his testimony that he had "various law violations" in the past, where

## CRIMINAL LAW—Continued

defendant made no objection to such testimony at the time it was made. *S. v. Fowler*, 116.

Trial court did not err in failing to instruct the jury on the principles of aiding and abetting. *S. v. Crawford*, 146.

**§ 114. Expression of Opinion by Court on the Evidence in the Charge**

Trial court's instruction which mistakenly asserted that defendant took the stand and testified as to material matters of the case is reversible error. *S. v. Butcher*, 97.

In prosecution for unlawfully taking deer between the hours of sunset and sunrise, trial court did not express an opinion on the evidence by its instruction that as a matter of law "a few minutes after seven o'clock on December 9 is after sunset." *S. v. Link*, 568.

**§ 115. Instructions on Lesser Degrees of Crime**

Defendant was not prejudiced by trial court's instructions which twice informed the jury that the State had elected to try defendant for second degree murder rather than first degree murder. *S. v. Fowler*, 116.

**§ 117. Charge on Credibility of Witness**

The trial judge can instruct the jury to scrutinize defendant's testimony in the light of his own interest in the case. *S. v. Best*, 204.

**§ 118. Charge on Contention of the Parties**

Objections to statement of contentions must be made before the jury retires. *S. v. Brown*, 280.

**§ 122. Additional Instructions After Initial Retirement of Jury**

Trial court's additional charge to the jury after the dinner recess, "If you can't reach a verdict, of course, it will be necessary that the case be tried again and someone is ultimately going to have to decide the case in Gaston County and I hope that it will be you," was without error. *S. v. Accor*, 10.

Trial court did not express an opinion in inquiring about the jury's progress during its deliberations. *S. v. McLamb*, 705.

**§ 124. Sufficiency and Effect of Verdict**

Jury verdict was insufficient to find defendant guilty of felonious assault, but in effect found defendant guilty of an aggravated assault with a deadly weapon with intent to kill, a misdemeanor. *S. v. Robinson*, 628.

**§ 126. Unanimity of Verdict**

Trial court did not err in questioning a juror to determine if the verdict returned by the foreman was her verdict and if she still assented thereto. *S. v. McLamb*, 705.

**§ 128. Discretionary Power of Court to Order Mistrial**

Motion for mistrial is addressed to the discretion of the trial judge. *S. v. Daye*, 435.

**§ 130. New Trial for Misconduct of or Affecting Jury**

The fact that juror rode by the house in which the alleged sale of heroin was made does not warrant a new trial. *S. v. Farris*, 143.

## CRIMINAL LAW—Continued

The fact that a prospective juror had heard of defendants' escape from jail did not warrant a mistrial in defendants' trial for attempted armed robbery. *S. v. Brown*, 261.

## § 131. New Trial for Newly Discovered Evidence

The Court of Appeals could not consider two letters that were in defendant's brief but not in the record on appeal. *S. v. Fowler*, 116.

Trial court properly denied defendant's motion for a new trial on the ground of newly discovered evidence based upon statement signed by prosecutrix repudiating her trial testimony that she had been raped by defendant. *S. v. Blalock*, 711.

## § 134. Form and Requisites of Judgment or Sentence

Trial judge's mistaken reference, in sentencing defendant for two other crimes, that defendant had also pled guilty to possession of less than one gram of marijuana was a mere *lapsus linguae*. *S. v. Ruiz*, 187.

A sentence imposing corporal punishment for any crime may not be pronounced against a defendant in his absence. *S. v. Stockton*, 287.

## § 135. Judgment in Capital Case

Trial court did not err in exclusion of prospective jurors who stated they could never return a verdict requiring the death penalty. *S. v. Watson*, 54.

## § 137. Conformity of Judgment to Indictment, Verdict or Plea

Where two defective larceny counts were consolidated with other and valid counts for judgment, a plea of guilty on any of the valid counts will support the judgment. *S. v. Ellis*, 163.

## § 138. Severity of Sentence, and Determination Thereof

There is no merit to defendant's contention that his rights were violated when he received greater punishment in the superior court than in the district court. *S. v. Young*, 237; *S. v. Rhodes*, 247.

Probation officer who conducted a pre-sentence investigation was properly allowed to give his recommendation that defendant not be placed on probation. *S. v. Pigg*, 345.

Defendant's contention that prior to being sentenced upon his plea of guilty of forgery, a probation officer expressed an opinion on the sentence defendant would receive, if true, would constitute no ground for relief on appeal. *S. v. Carver*, 235; *S. v. Phillips*, 226.

Defendants are entitled to the benefit of statutes passed while their appeal was pending which reduced the punishment for the following crimes: possession of marijuana, *S. v. McIntyre*, 479; *S. v. Smith*, 583; contra, *S. v. Goodwin*, 700; possession of hypodermic needle for administering habit-forming drugs, *S. v. Kelly*, 588; unlawfully taking deer, *S. v. Link*, 568.

Decisions relating to work release are discretionary and not subject to procedural due process. *Goble v. Bounds*, 579.

Upon trial *de novo* the superior court may impose a sentence in excess of that imposed in the district court. *S. v. Turner*, 603.

## CRIMINAL LAW—Continued

**§ 145.1. Probation**

Probation or suspension of sentence is not a constitutional right but is an act of grace. *S. v. Pigg*, 345.

The fact that a condition of probation is not among those specifically listed as permissible under G.S. 15-199 does not prevent the court from imposing it. *S. v. Foust*, 382.

A condition of probation requiring defendant to reimburse the State for cost of court-appointed counsel does not infringe defendant's constitutional right to counsel. *S. v. Foust*, 382.

Revocation of probation hearing is remanded for failure of the trial court to make sufficient findings of fact as to whether defendant's failure to comply with the conditions of probation was wilful or without lawful excuse. *Ibid*.

**§ 146. Appellate Jurisdiction of Court of Appeals in Criminal Cases**

Appeal from sentence imposed upon guilty pleas presents only the question whether error of law appears on the face of the record proper. *S. v. Elledge*, 262; *S. v. McClure*, 634.

**§ 149. Right of State to Appeal**

State could not appeal from trial court's determination that a suspended sentence given defendant had not begun and could therefore not be revoked. *S. v. Cox*, 221.

**§ 155.5. Docketing of Transcript of Record in Court of Appeals**

Appeal is dismissed for failure to docket the record on appeal within the time allowed by the Rules of the Court of Appeals. *S. v. Boyette*, 252; *S. v. Bennett*, 251; *S. v. Williams*, 423.

**§ 158. Presumptions as to Matters Omitted from Record**

Assignment of error based upon matters outside the record will be disregarded. *S. v. Carver*, 235.

**§ 160. Correction of Record**

Criminal action is remanded to superior court for correction of the minutes where it appears that the wrong case number was affixed to the records of the plea, verdict, judgment and commitment. *S. v. Fountain*, 337.

**§ 162. Objections, Exceptions and Assignments of Error to Evidence**

Defendant waived objection to testimony by failing to object when the testimony was offered. *S. v. Brown*, 280.

Trial court's instructions to the jury that "you may disregard what caused the bruise" was sufficient to apprise the jury that they were not to regard the witness' testimony as an expression of expert opinion. *S. v. Sallie*, 499.

**§ 164. Exceptions and Assignments of Error to Refusal of Motion for Nonsuit**

The Court of Appeals reviews the sufficiency of the evidence to sustain the verdict, notwithstanding defendant failed to make the appropriate motions at the trial. *S. v. Robinson*, 200.

## CRIMINAL LAW—Continued

**§ 166. The Brief**

Exceptions and assignments of error not brought forward and argued in the brief are deemed abandoned. *S. v. Fountain*, 107; *S. v. Broadnax*, 319; *S. v. Brown*, 327; *S. v. Rush*, 539.

Appeal is subject to dismissal where the exceptions and assignments of error are not set out in the brief and properly numbered with reference to the printed record. *S. v. Oliver*, 184.

**§ 167. Harmless and Prejudicial Error in General**

Technical error alone will not entitle defendant to a new trial. *S. v. Ruiz*, 187.

**§ 168. Harmless and Prejudicial Error in Instructions**

The defendant cannot complain of instructions favorable to him. *S. v. Rich*, 60.

Trial court's instruction which mistakenly asserted that defendant took the stand and testified as to material matters of the case is reversible error. *S. v. Butcher*, 97.

A charge must be construed contextually and isolated portions will not be held prejudicial when the charge as a whole is correct. *S. v. Holt*, 339; *S. v. Robinson*, 200.

Error committed by trial court in rape prosecution in instructing the jury on the lesser offense of assault with intent to commit rape was not prejudicial to defendant. *S. v. Davis*, 492.

**§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence**

Defendant may not complain of evidence elicited by him on cross-examination. *S. v. Brown*, 280.

Trial court did not err in admission of testimony offered over objection where similar testimony had previously been admitted without objection. *Ibid.*

**§ 170. Harmless and Prejudicial Error in Remarks of Court and Argument of Solicitor**

Trial judge's statement to defendant, "Just answer yes or no. If you want to make a speech to the jury you can do that later," held not prejudicial. *S. v. Fowler*, 116.

Trial court's statement to the jury that motions for directed verdicts of not guilty had been granted only as to two of four defendants was not an expression of opinion. *S. v. Fry*, 39.

Any prejudice in the solicitor's comment upon defendant's failure to bring in as witnesses eight persons who were present at the time of his arrest was nullified by the court's instructions. *S. v. Smith*, 583.

**§ 171. Error Relating to One Degree of the Crime Charged**

Defendant cannot be prejudiced by error in submitting the question of defendant's guilt of a lesser included crime of the offense charged. *S. v. Accor*, 10.

**§ 172. Whether Error is Cured by the Verdict**

Conviction of second degree murder rendered harmless any error in submitting question of defendant's guilt of first degree murder. *S. v. Sallie*, 499.

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## DAMAGES

### § 11. Punitive Damages

Defendant's representations to plaintiff that its cosmetics operations in this State were legal did not constitute fraud entitling plaintiff to punitive damages. *Mills v. Koscot Interplanetary*, 681.

## DEATH

### § 1. Proof of Cause of Death

Certified copy of the victim's death certificate was properly admitted for the purpose of proving the time, place and cause of death. *S. v. Watson*, 54.

### § 7. Determination of Life Expectancy; Damages

Instructions that the jury in a wrongful death action could consider the "mortuary value of deceased" was erroneous. *Davis v. Imes*, 521.

## DEEDS

### § 15. Easement Upon Special Limitations

A deed conveyed a determinable easement to back water upon the grantor's lands, and upon failure of the grantee to use the easement within the time allowed, the easement automatically terminated by operation of law. *Price v. Bunn*, 652.

## DISORDERLY CONDUCT

### § 1. Elements of the Offense

Statute defining the crime of disorderly conduct is not unconstitutionally vague and overbroad. *S. v. Summrell*, 1.

### § 2. Prosecutions

State's evidence was sufficient for jury in prosecution for disorderly conduct at a hospital. *S. v. Summrell*, 1.

## DIVORCE AND ALIMONY

### § 2. Process and Pleadings

Issues of fact in an action for alimony without divorce may now be determined by the judge if a jury trial is waived by failing to make timely demand therefor. *Williams v. Williams*, 468.

### § 16. Alimony Without Divorce

Issues of fact in an action for alimony without divorce may now be determined by the judge if a jury trial is waived by failing to make timely demand therefor. *Williams v. Williams*, 468.

### § 18. Alimony and Subsistence Pendente Lite

Trial court's findings that defendant wife is a "dependent spouse" amounted merely to a conclusion not supported by a sufficient finding of fact. *Presson v. Presson*, 81.

Trial court erred in awarding alimony pendente lite to the wife where it made no findings or conclusions that the wife "is entitled to the relief demanded" or that she "has not sufficient means whereon to subsist." *Ibid*.

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**DIVORCE AND ALIMONY—Continued**

Award of counsel fees to the wife cannot be sustained where the court's award of alimony pendente lite to the wife has been set aside. *Ibid.*

Trial court was not required to make negative findings of fact justifying his denial of alimony pendente lite. *In re Custody of Mason*, 334.

Attempted award of alimony to the wife is set aside where the trial judge failed to determine whether the wife is the dependent spouse and the husband the supporting spouse. *Williams v. Williams*, 468.

**§ 19. Modification of Decree**

Plaintiff's action to recover from her former husband educational expenses of her son was not barred by a modification of the deed of separation providing for the educational expenses of her son. *Owens v. Little*, 484.

Trial court erred in modifying an award of temporary subsistence and child custody where movant failed to show a change of circumstances of the parties. *McDowell v. McDowell*, 643.

**§ 21. Enforcing Payment**

Court properly required defendant husband to post a bond to secure his compliance with a judgment requiring him to make monthly payments for support of his wife and children where he no longer resides within the State and has no attorney of record in the case. *Parker v. Parker*, 616.

Husband's obligation to make support payments may be enforced by contempt proceedings where the parties agreed to the terms of a consent judgment and judgment entered by the court ordered the husband to make the payments which he had agreed to make. *Parker v. Parker*, 616.

**§ 23. Support of Children of the Marriage**

Trial court erred in awarding custody of minor children and directing payments for their support absent appropriate findings as to the best welfare and reasonable needs of the children. *Presson v. Presson*, 81.

Portion of a child support judgment which provided, upon the default of the father, for the father's imprisonment without notice and hearing was invalid. *Whitehead v. Whitehead*, 393.

Court order must separately state and identify allowance for alimony and allowance for child support. *Williams v. Williams*, 468.

Trial court did not err in refusing to increase or decrease amount of child support payments. *Carter v. Carter*, 648.

District court's order that plaintiff pay \$1000 per month for child support did not alter a separation agreement but merely required plaintiff to pay the amount he had agreed to pay. *Zuccarello v. Zuccarello*, 531.

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**EASEMENTS****§ 8. Nature and Extent of Easement**

A deed conveyed a determinable easement to back water upon the grantor's lands, and upon failure of the grantee to use the easement within the time allowed, the easement automatically terminated by operation of law. *Price v. Bunn*, 652.

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ELECTRICITY

## § 4. Care Required

Violation of the National Electrical Code is negligence per se, and provisions of the Code relating to equipment grounding are applicable to the owner of an outdoor ice merchandiser installed at a service station to sell ice to the public. *Jenkins v. Starrett Corp.*, 437.

## § 7. Connections, Disconnections and Fires

In an action to recover for injuries resulting from a severe electrical shock received by plaintiff when he attempted to remove ice from an outside merchandiser, plaintiff's evidence was insufficient to go to the jury against the former owner of the merchandiser but was sufficient to go to the jury against the present owner. *Jenkins v. Starrett Corp.*, 437.

## EQUITY

## § 1. Nature of Equity

Equity would not relieve against reversion of a determinable easement to back up waters on the grantor's land by rebuilding a dam. *Price v. Bunn*, 652.

## EVIDENCE

## § 4. Presumptions

The presumption that the possession of an artificial light and firearms at night in an area frequented by deer shall be prima facie evidence of the violation of the statute making it unlawful to take deer at night by artificial light held valid. *S. v. Lassiter*, 292.

## § 11. Transactions or Communications with Decedent

In a wrongful death action, defendant's testimony that the intestate knew of defendant's intoxication but continued to ride with him was admissible despite the Dead Man's Statute. *Bryant v. Ballance*, 181.

## § 28. Public Records and Documents

Certified copy of the victim's death certificate was properly admitted for the purpose of proving the time, place and cause of death. *S. v. Watson*, 54.

## § 32. Parol Evidence Affecting Writings

In an action to recover damages for breach of a contract to construct a house, the parol evidence rule was not violated by admission of evidence of the condition of the house after its acceptance by plaintiffs. *Tisdale v. Elliott*, 598.

## § 35. Declarations Constituting Part of the Res Gestae

Statement made by a witness contemporaneously with defendant's escape from the scene of the crime that defendant was getting into a waiting car was competent as part of the *res gestae*. *S. v. McKinney*, 214.

## § 44. Nonexpert Opinion Evidence

A lay witness is competent to testify as to the intoxication of a person. *Bryant v. Ballance*, 181.

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EVIDENCE—Continued

## § 48. Competency and Qualification of Experts

In absence of a request, record need not show a specific finding as to the qualification of a witness as an expert. *S. v. Johnson*, 323.

Utilities Commission did not err in admission of expert evidence without a specific finding that the witness was an expert. *Utilities Comm. v. Petroleum Carriers*, 554.

## EXECUTORS AND ADMINISTRATORS

## § 24. Right of Action for Personal Services Rendered Decedent

Failure of plaintiffs to present competent evidence of a special contract to devise property in consideration of personal services does not preclude submission of case to jury based on quantum meruit. *Hicks v. Hicks*, 347.

## § 25. Limitations on Action for Personal Services Rendered Decedent

Plaintiffs' claim based on quantum meruit for services rendered decedents was barred by the three-year statute of limitations. *Hicks v. Hicks*, 347.

## § 27. Evidence of Value of Personal Services

Revoked joint will devising property to plaintiffs is not competent evidence of a special contract to devise the property to plaintiffs. *Hicks v. Hicks*, 347.

## § 33. Distribution of Estate under Family Agreements

Trial court properly approved a family settlement agreement which modified dispositive provisions of testatrix' will and withdrew from probate a holographic codicil purportedly executed by testatrix. *College v. Thorne*, 27.

## FORGERY

## § 1. Nature and Elements of the Crime

A person who endeavors to obtain money on a forged instrument is presumed to have forged the instrument. *S. v. Jordan*, 254; *S. v. Moore*, 255.

## § 2. Prosecutions

State's evidence was sufficient for the jury in prosecution for uttering a forged check. *S. v. Cradle*, 120.

State's evidence was sufficient for jury in prosecution for forgery of a check. *S. v. Bauguess*, 457.

## FRAUD

## § 12. Sufficiency of Evidence

Defendant's representations to plaintiff that its cosmetics operations in this State were legal did not constitute fraud entitling plaintiff to punitive damages. *Mills v. Koscot Interplanetary*, 681.

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**FRAUDS, STATUTE OF****§ 7. Contract to Convey or Devise**

Oral contract to devise a portion of a farm in compensation for services rendered is within the statute of frauds and is unenforceable. *Hicks v. Hicks*, 347.

Revoked joint will devising property to plaintiffs is not competent evidence of a special contract to devise the property to plaintiffs. *Ibid.*

**GUARANTY**

Letter from the president of corporate defendant constituted a guaranty as a matter of law and not an offer of guaranty, and use of the words "please accept" were nothing more than words of courtesy. *Sales Co. v. Plywood Distributors*, 429.

**HOMICIDE****§ 14. Presumptions and Burden of Proof**

Malice is implied from an assault with the hands or feet committed upon an infant of tender years. *S. v. Sallie*, 499.

**§ 20. Photographs**

Trial court properly admitted for illustrative purposes 13 color photographs of the body of a three-year-old homicide victim. *S. v. Sallie*, 499.

**§ 21. Sufficiency of Evidence**

State's evidence was sufficient for jury in prosecution for first degree murder. *S. v. Watson*, 54.

Evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder of a three-year-old child who died as a result of receiving a severe blow to her abdomen. *S. v. Sallie*, 499.

**§ 25. Instructions on First Degree Murder**

Conviction of second degree murder rendered harmless any error in submitting question of defendant's guilt of first degree murder. *S. v. Sallie*, 499.

**§ 26. Instructions on Second Degree Murder**

Defendant could not complain of an additional instruction which omitted the words "deadly weapon" from the definition of second degree murder. *S. v. Rich*, 60.

**§ 27. Instructions on Manslaughter**

A manslaughter prosecution is reversed for failure of the trial judge to give sufficient instructions on proximate cause. *S. v. Mizelle*, 206.

**§ 30. Instructions on Lesser Degrees**

Defendant was not prejudiced by trial court's instructions which twice informed the jury that the State had elected to try defendant for second degree murder rather than first degree murder. *S. v. Fowler*, 116.

**§ 32. Appeal and Review**

Two letters in defendant's brief could not serve as the basis for a new trial for newly discovered evidence, since the letters were merely impeaching evidence. *S. v. Fowler*, 116.

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HUNTING

## § 3. Prosecutions

The statutory presumption that possession of an artificial light in an area frequented by deer shall constitute prima facie evidence of a violation of the statute held valid. *S. v. Lassiter*, 292.

The statutes prohibiting the unlawful taking of deer with aid of an artificial light are constitutional; warrants charging a violation of the offense were sufficient and evidence of defendant's guilt was properly submitted to the jury. *Ibid.*

Warrant was sufficient to charge the offense of unlawfully taking deer from a public highway, and State's evidence was sufficient for jury in a prosecution for that offense. *S. v. Link*, 568.

In prosecution for unlawfully taking deer between the hours of sunset and sunrise, trial court did not express an opinion on the evidence by its instruction that as a matter of law "a few minutes after seven o'clock on December 9 is after sunset." *Ibid.*

Defendant is entitled to the benefit of the statute reducing punishment for the offense of unlawfully taking deer which was passed prior to his trial *de novo* in superior court. *Ibid.*

## HUSBAND AND WIFE

## § 3. Agency of One Spouse for the Other

No presumption that the husband is acting as agent for the wife arises from the mere fact of the marital relationship. *Hayes v. Griffin*, 606.

## § 11. Construction and Operation of Separation Agreements

Plaintiff's action to recover from her former husband the educational expenses of their son was not barred by a modification of the deed of separation providing for the educational expenses of the children. *Owens v. Little*, 484.

Husband's obligation to make support payments may be enforced by contempt proceedings where the parties agreed to the terms of a consent judgment and judgment entered by the court ordered the husband to make the payments which he had agreed to make. *Parker v. Parker*, 616.

## INDICTMENT AND WARRANT

## § 8. Joinder of Counts, Merger, and Duplicity

The solicitor was not required to elect before trial whether he would prosecute defendant on a charge of resisting arrest or on a charge of assault on an officer. *S. v. Summrell*, 1.

Defendant waived duplicity in the indictment by going to trial without making a motion to quash. *S. v. Kelly*, 588.

## § 9. Charge of Crime

Where a warrant sufficiently charges the commission of a statutory offense, reference to descriptive matter or evidentiary detail or to an inappropriate section of the statute will be treated as surplusage. *S. v. Link*, 568.

An allegation in the disjunctive that defendant possessed a "hypodermic syringe or needle" did not render the indictment fatally defective for uncertainty. *S. v. Kelly*, 588.

## INDICTMENT AND WARRANT—Continued

## § 12. Amendment of Indictment and Warrant

Trial court did not err in allowing solicitor to amend a warrant charging disorderly conduct after the State and defendant had rested. *S. v. Summrell*, 1.

Failure to write amendment into a warrant was not fatal where it was stipulated that the warrant was amended. *S. v. Fountain*, 107.

The State could properly amend a larceny warrant by inserting the words "a corporation" immediately following the name of the store. *S. v. Young* 237.

Upon defendants' appeal from conviction in district court, superior court did not err in allowing the State's motion to amend the warrants for receiving stolen goods by describing ownership of the stolen property in more detail. *S. v. Truesdale*, 622.

## § 14. Grounds of Motion to Quash

Superior court properly refused to quash on the ground of double jeopardy indictments which were inadvertently sent to the grand jury when defendants appealed from district court convictions, where the State did not proceed in superior court under the indictments but tried defendants upon the warrants on which they were tried in the district court. *S. v. Truesdale*, 622.

## INFANTS

## § 7. Contributing to Delinquency of Minor

In prosecution for contributing to the delinquency of a minor, it was not necessary for the State to allege or prove that the child had become a delinquent child. *S. v. Worley*, 198.

## § 10. Commitment of Minors for Delinquency

Juvenile's confession was properly admitted in juvenile delinquency hearing absent objection thereto. *In re Harper*, 330.

Juvenile delinquent should be committed to the care of the "Board," not "Department," of Juvenile Correction. *Ibid.*

Juvenile proceedings must be regarded as criminal for Fifth Amendment purposes of the privilege against self-incrimination. *S. v. Rush*, 539.

Juvenile's confession was properly admitted in a juvenile delinquency proceeding. *Ibid.*

The evidence was sufficient to permit a finding that appellant is a delinquent child where the evidence was sufficient to convict him of common law robbery. *Ibid.*

Statute prohibiting the court from giving an opinion on the evidence does not apply in a juvenile delinquency proceeding. *Ibid.*

Trial court properly committed a juvenile to the temporary custody of the Board of Juvenile Corrections without privilege of bond pending disposition of his appeal. *Ibid.*

## INSANE PERSONS

## § 10. Actions Against Insane Persons

There is nothing in the record that required the trial court in an action for alimony without divorce to determine the competency of defendant, and trial judge's remark after trial that defendant needed a guardian was merely an expression of impatience. *Williams v. Williams*, 468.

## INSURANCE

## § 2. Brokers and Agents

Plaintiff's evidence was insufficient to show that defendant insurance agent had contracted to procure for plaintiff "complete and full insurance on plaintiff's pier"; consequently, plaintiff could not recover under theory of breach of contract or under theory of negligence for failure of the agent to procure insurance protection against the particular risk which resulted in plaintiff's loss. *Johnson v. Tenuta & Co.*, 375.

## § 6. Construction and Operation of Policies

Since policies of insurance are prepared by the insurer, they are liberally construed in favor of the insured and strictly construed against the insurer. *Dildy v. Insurance Co.*, 66.

Policy provisions which conflict with existing statutes are void. *Dildy v. Insurance Co.*, 66.

Ambiguity in words selected by an insurance company must be resolved in favor of the insured. *Machinery Co. v. Insurance Co.*, 85.

Comprehensive coverage provisions of an insurance contract must be read together with other provisions which, through exclusions, more definitely define the scope of the coverage provided. *Ibid.*

## § 69. Protection Against Injury by Uninsured Motorists

The provision of an automobile liability policy which required insured, in an action against insurer, to join as a party defendant the person or organization allegedly responsible for the damage to insured, is held void as against public policy in those cases where the party defendant is a nonresident uninsured motorist and not amenable to the jurisdiction of this State. *Dildy v. Insurance Co.*, 66.

## § 78. Motor Cargo Insurance

The words "held in trust," when used in a policy of insurance, are not to be taken in their technical sense so as to limit coverage to cases where title to property is vested in a trustee, but are to be considered as inclusive of all property which has been entrusted to the insured. *Machinery Co. v. Insurance Co.*, 85.

A provision of a motor cargo insurance policy which covered the land shipment of textile machinery "held in trust" by the insured *is held* to embrace the insured's hauling by truck of twenty-three hosiery machines owned by a customer who agreed to pay the insured \$8.50 an hour for carrying the machinery from Pennsylvania to North Carolina. *Ibid.*

Evidence offered by a hosiery machinery dealer established that it was transporting a customer's hosiery machines under a contract of hauling at the time the machines were damaged in a wreck, and consequently the dealer could not recover for loss of the machines under an insurance policy which specifically excluded goods carried under a contract of hauling. *Ibid.*

## § 82. Vehicles Covered by Liability Insurance

In an action against an automobile liability insurer to recover upon a judgment obtained against a motorist allegedly insured by defendant as the named insured of an owned vehicle, plaintiff's evidence was insufficient to show that the negligent motorist was the owner of the automobile involved in the collision with plaintiff. *Younts v. Insurance Co.*, 426.

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INSURANCE—Continued

## § 105. Actions Against Insured

The provision of an automobile liability policy which required insured, in an action against insurer, to join as a party defendant the person or organization allegedly responsible for the damage to insured, is held void as against public policy in those cases where the party defendant is a nonresident uninsured motorist and not amenable to the jurisdiction of this State. *Diddy v. Insurance Co.*, 66.

In an action against an automobile liability insurer to recover upon a judgment obtained against a motorist allegedly insured by defendant as the named insured of an owned vehicle, plaintiff's evidence was insufficient to show that the negligent motorist was the owner of the automobile involved in the collision with plaintiff. *Younts v. Insurance Co.*, 426.

## § 115. Insurable Interest in Property

The insured under a fire policy offered sufficient evidence to show that she had an insurable interest in the premises destroyed by fire. *McElrath v. Insurance Co.*, 211.

## § 130. Notice and Proof of Loss

Insured's evidence was sufficient to show that the insurer waived the provisions of a fire policy requiring proof of loss to be furnished within 60 days. *McElrath v. Insurance Co.*, 211.

## § 135. Subrogation; Rights Against Tortfeasors

In an action brought by fire insurers to recover the amount of a claim paid to insured for damages from a fire which allegedly started because of defective wiring in a Coca-Cola machine owned by defendant, evidence was sufficient for submission to the jury of an issue of insured's contributory negligence. *Insurance Co. v. Bottling Co.*, 639.

## § 137. Time Limitations in Action on Fire Policy

Where trial court dismissed without prejudice plaintiff's original action on a fire policy for failure to obtain proper service of process on defendant insurer, plaintiff's new action instituted within the 30 days allowed by the court's order but more than a year after the loss was not barred by the one-year limitation provided in the policy. *Gower v. Insurance Co.*, 368.

## JURY

## § 2. Special Venires

Trial court did not abuse its discretion in denial of defendant's motion for a special venire on ground of pretrial publicity of the crime and of the escape from jail by defendant's companions. *S. v. Brown*, 315.

## § 3. Number of Jurors; Competency and Qualification

Order of the trial judge requiring the sheriff to summon 25 additional jurors without resorting to the regular jury list was proper where the order required "that the jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected from the regular jury list." *S. v. Brown*, 261.

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JURY—Continued

## § 5. Personal Disqualification

Trial court did not err in denial of defendant's challenge for cause of a prospective juror who was the father-in-law of the solicitor for the district. *S. v. Watson*, 54.

## § 7. Challenges

Trial court did not err in exclusion of prospective jurors who stated they could never return a verdict requiring the death penalty. *S. v. Watson*, 54.

Defendant in a noncapital case was not entitled to peremptorily challenge more than six jurors. *S. v. Brown*, 261.

## LANDLORD AND TENANT

## § 7. Fixtures on Leased Premises

An oil company which placed an underground storage tank and accessory equipment on leased premises under agreement with the tenant had the right to remove them as trade fixtures and did not abandon them to the landlord by failure to remove them prior to the expiration of the tenant's lease. *Oil Co. v. Riggs*, 547.

## LARCENY

## § 1. Elements of the Crime

Larceny from the person is a felony without regard to the value of the property in question. *S. v. Sharpless*, 202.

## § 4. Warrant and Indictment

Larceny indictment in which property allegedly stolen from a grocery store is itemized in 26 classifications described the stolen property with sufficient certainty. *S. v. Fuller*, 193.

The State could properly amend a larceny warrant by inserting the words "a corporation" immediately following the name of the store. *S. v. Young*, 237.

Defect in a count of an indictment charging felonious larceny is immaterial where defendant did not plead guilty to that offense and no judgment was imposed on that charge. *S. v. McClure*, 634.

## § 7. Sufficiency of Evidence and Nonsuit

Issue of defendant's guilt of larceny from the person was properly submitted to the jury. *S. v. Sharpless*, 202.

State's evidence, including fingerprint evidence, was sufficient for the jury in prosecution for breaking and entering and larceny. *S. v. Kilian*, 340.

Sole evidence on the issue of ownership of stolen goods, which consisted of a police officer's testimony received without objection, that he ascertained the goods to be owned by a named towel company, is held sufficient to support a jury finding as to ownership. *S. v. Mathis*, 363.

## LIMITATION OF ACTIONS

## § 4. Accrual of Right of Action

Trial court properly dismissed with prejudice plaintiff's action instituted in January 1970 to recover interest allegedly paid under protest in 1963. *Lancaster v. Smith*, 129.

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MASTER AND SERVANT**§ 11. Agreements Not to Engage in Like Employment after Termination of Employment**

Stated consideration for a covenant not to compete in employment contracts executed by defendants after they had been employed by plaintiff as salesmen for some time—the initiation of a profit sharing plan for all employees—was illusory as to defendants, and the covenants were unenforceable. *Wilmar, Inc. v. Liles*, 71.

**§ 62. Injuries on the Way to and From Work**

Injuries received by persons employed by Highway Commission as mowing machine operators when their car went out of control as they were leaving work arose out of and in the course of their employment. *Robinson v. Highway Comm.*, 208.

Injury sustained by plaintiff in a collision when riding to lunch on a truck owned by a telephone company for which defendant employer was installing underground cables and driven by the telephone company's employee occurred by accident arising out of and in the course of his employment. *Enroughty v. Industries, Inc.*, 400.

**§ 65. Back Injuries**

Industrial Commission properly awarded plaintiff compensation for only 50% permanent partial disability to his back, notwithstanding there was evidence that plaintiff was totally unable to perform the essential duties of a carpenter, his occupation prior to being injured. *Loflin*, 574.

**§ 68. Occupational Diseases**

The Industrial Commission correctly found that employee's death resulted from asbestosis on the basis of evidence that asbestosis accelerated and contributed to the death but that the immediate cause of the death was an unrelated brain tumor. *Self v. Starr-Davis Co.*, 694.

**§ 73. Loss of Specific Members**

Industrial Commission properly awarded plaintiff compensation for 55% partial disability of her left hand, not for total incapacity, notwithstanding there was evidence that plaintiff's injuries incapacitated her to perform certain essential duties of the only gainful occupation for which she was qualified by work experience. *Dudley v. Motor Inn*, 474.

**§ 77. Review of Award for Change of Condition**

A plaintiff's claim for additional compensation, which was made more than 12 months after receipt of his last compensation check but which was made within 12 months of his receipt of Industrial Commission Form 28B, is not barred by the one-year statute of limitation. *Willis v. Davis Industries*, 101.

**§ 93. Prosecution of Claim and Proceedings Before the Commission**

In a workmen's compensation proceeding, the Industrial Commission properly denied plaintiff's motion to take additional evidence on appeal and motion for a rehearing on all issues. *Cooke v. Motor Lines*, 342.

**§ 96. Review in the Court of Appeals**

Where the Industrial Commission's findings of fact are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the Commission for proper findings. *Willis v. Davis Industries*, 101.

## MASTER AND SERVANT—Continued

## § 108. Unemployment Compensation

A 70-year-old former laundry employee is not unavailable for work merely because employers in her locality do not customarily employ persons of her age. *In re Thomas*, 513.

## MORTGAGES AND DEEDS OF TRUST

## § 13. Estates, Rights, and Duties of Parties to the Instrument

Plaintiffs' complaint failed to state a claim for relief against defendant trustee for breach of fiduciary duty in a foreclosure sale under a deed of trust. *Huggins v. DeMent*, 673.

## § 26. Notice and Advertisement of Sale

A debtor in default need not be given personal notice of a foreclosure sale absent a valid contract to give such notice. *Huggins v. DeMent*, 673.

Notice of foreclosure sale by advertisement at a courthouse door and in a newspaper was sufficient to meet due process requirements. *Ibid*.

## MUNICIPAL CORPORATIONS

## § 30. Zoning Ordinances

Board of Adjustment's determination of whether to issue a special use permit was not an unlawful exercise of legislative power. *Kenan v. Board of Adjustment*, 688.

The record supports the Board of Adjustment's denial of a special use permit for construction of a self-service gas station. *Ibid*.

## NARCOTICS

## § 2. Indictment

Bills of indictment charging defendant with the felony of selling amphetamine capsules were not fatally defective in failing to allege that defendant possessed the capsules for the purpose of sale. *S. v. Guy*, 637.

Bill of indictment was sufficient to charge offense of unlawful possession of a hypodermic syringe and needle for the purpose of administering habit-forming drugs. *S. v. Kelly*, 588.

An allegation in the disjunctive that defendant possessed a "hypodermic syringe or needle" did not render the indictment fatally defective for uncertainty. *Ibid*.

## § 3. Competency and Relevancy of Evidence

Testimony that witness' automobile had been impounded was irrelevant in prosecution for possession of heroin and was properly excluded from the record. *S. v. Smith*, 46.

A matchbox and its contents of heroin were admissible as exhibits. *S. v. Hood*, 170.

Trial court properly permitted police officer to state his opinion that a substance purchased by a confidential informant was marijuana. *S. v. Johnson*, 323.

Evidence of chain of possession of glassine bags found in defendant's apartment was sufficient to permit an expert to testify that the bags contained heroin. *S. v. Williams*, 423.

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NARCOTICS—Continued

It was not prejudicial to admit in evidence a receipt for a telegraph money order from defendant to an address in California, there being evidence a package of marijuana was mailed to defendant from the California address. *S. v. Kistler*, 431.

**§ 4. Sufficiency of Evidence**

Evidence that three tinfoil packages of heroin dropped from the side of defendant was sufficient for the jury in prosecution for possession of heroin. *S. v. Smith*, 46.

In a prosecution charging defendant with possession and growing of marijuana, State's evidence was sufficient to show that the pig pen and cornfield in which the marijuana was found were under defendant's control. *S. v. Spencer*, 112.

State's evidence was sufficient to support a jury finding that defendant was in the constructive possession of heroin found in the apartment of another. *S. v. Blaylock*, 134.

Issue of defendant's guilt of possession of heroin was properly submitted to the jury. *S. v. Fry*, 39; *S. v. Robinson*, 200.

Although defendant was not in his residence at the time marijuana was seized, State's evidence was sufficient to show that defendant possessed the drugs within the meaning of the law. *S. v. Kistler*, 431.

**§ 4.5. Instructions**

Evidence did not warrant an instruction on the misdemeanor of possession of marijuana. *S. v. McIntyre*, 479.

**§ 5. Verdict and Punishment**

Where no exceptions and assignments of error are made and no error appears on face of record in appeal from conviction of unlawful possession of heroin, the judgment must be sustained. *S. v. Sherman*, 222.

Defendants are entitled to the benefit of a statute passed while their appeals were pending which reduced the maximum punishment for the first offense of possession of marijuana to six months. *S. v. McIntyre*, 479; *S. v. Smith*, 583; *contra*, *S. v. Goodwin*, 700.

Defendant is entitled to the benefit of a statute reducing the punishment for unlawful possession of a hypodermic syringe and needle for the purpose of administering habit-forming drugs which was passed while his appeal was pending. *S. v. Kelly*, 588.

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NEGLIGENCE**§ 8. Proximate Cause**

Defendants were prejudiced by the court's failure to define proximate cause, including the element of foreseeability of injury. *Regan v. Player*, 593.

**§ 10. Intervening Negligence**

In an action against a manufacturer for breach of warranty of fitness of a pre-emergent herbicide for use on a squash crop, failure of the retailer to give plaintiff the warning furnished by the manufacturer in its herbicide manual against use of the product under certain conditions does not constitute intervening negligence by the retailer. *Wilson v. Chemical Co.*, 610.

## NEGLIGENCE—Continued

## § 29. Sufficiency of Evidence of Negligence

Plaintiff in wrongful death action was required to prove only one aspect of negligence. *Smith v. Kilburn*, 449.

## PARENT AND CHILD

## § 7. Duty to Support Child

A father who ratified and acquiesced in a child support judgment by making payments into the clerk's office pursuant thereto could not thereafter complain that the judgment was fatally defective. *Whitehead v. Whitehead*, 393.

Portion of a child support judgment which provided, upon the default of the father, for the father's imprisonment without notice and hearing was invalid. *Ibid.*

Clerk of superior court had jurisdiction to enter an order requiring that a father residing in this State shall provide for the support of his children who were living in Bermuda and who had never been residents of the State. *Ibid.*

## PARTIES

## § 1. Necessary Parties

There was a fatal defect of parties in action to have a parol trust impressed on property allegedly conveyed with instructions to divide such property among testatrix's children who had not already been conveyed a portion of her lands. *Wall v. Sneed*, 719.

## PRINCIPAL AND AGENT

## § 4. Proof of Agency

Plaintiff's evidence was sufficient to be submitted to the jury on the question of whether defendant's brother was the agent of defendant in negotiating and then terminating a lease of land owned by defendant. *Investment Properties v. Allen*, 406.

## § 5. Scope of Authority

The principal is responsible for acts of an agent within the scope of his apparent authority unless the other party knows he is acting in excess of his actual authority. *Investment Properties v. Allen*, 406.

## PRIVACY

Plaintiff offered sufficient evidence that a telephone company breached his right of privacy by printing the picture of another person with plaintiff's name under it in an advertisement in a telephone book. *Barr v. Telephone Co.*, 388.

## PROCESS

## § 10. Service by Publication

Where service of summons is made by publication, plaintiff must file an affidavit specifically alleging that defendant's dwelling house is unknown and cannot with due diligence be ascertained. *Edwards v. Edwards*, 166.

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QUASI CONTRACTS

## § 2. Actions to Recover on Implied Contracts

Failure of plaintiffs to present competent evidence of a special contract to devise property in consideration of personal services does not preclude submission of case to jury based on quantum meruit. *Hicks v. Hicks*, 347.

Plaintiffs' claim based on quantum meruit for services rendered decedents was barred by the three-year statute of limitations. *Ibid*.

## RAPE

## § 6. Instructions on Lesser Degrees of the Crime

The court did not err in failing to instruct the jury on the lesser offenses of assault with a deadly weapon and assault on a female. *S. v. Davis*, 492.

Error committed by the court in rape prosecution in instructing the jury on the lesser offense of assault with intent to commit rape was not prejudicial to defendant. *Ibid*.

## RECEIVING STOLEN GOODS

## § 1. Nature and Elements of the Offense

Knowledge by the accused that the goods were stolen is an essential element of the offense of receiving stolen goods. *S. v. Watson*, 189.

## § 2. Indictment

Indictment for receiving stolen goods need not state the name of those from whom the goods were stolen. *S. v. McClure*, 634.

Warrants were sufficient to charge defendants with the crime of receiving stolen property. *S. v. Truesdale*, 622.

## § 5. Sufficiency of Evidence

Issue of defendant's guilt of the offense of receiving a stolen television set was properly submitted to the jury. *S. v. Watson*, 189.

## § 6. Instructions

An instruction which would allow the jury to find defendant guilty of receiving a stolen television set without finding that defendant had knowledge the set had been stolen was prejudicial error. *S. v. Watson*, 189.

## ROBBERY

## § 2. Indictment

Bills of indictment were sufficient to show that U. S. Currency was the subject of attempted armed robbery and that defendants were not attempting to take their own property. *S. v. Brown*, 261.

Petition alleging that a juvenile took money from the victim by putting him "in fear and danger of his life" was sufficient to allege common law robbery without including the word "violence." *S. v. Rush*, 539.

## § 4. Sufficiency of Evidence

Defendant's guilt of attempted armed robbery was properly submitted to the jury, notwithstanding defendant's statement at the time of the attempt that he was "not in on this." *S. v. Brown*, 261.

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**ROBBERY—Continued**

State's evidence was sufficient to show that defendant was the driver of a getaway car in armed robbery prosecution. *S. v. Brown*, 315.

State's evidence was sufficient to go to jury in prosecution of two defendants for armed robbery. *S. v. Osborne*, 420.

**§ 5. Instructions**

Defendants in armed robbery prosecution are entitled to a new trial for failure of the trial court in its instructions to make a sufficient distinction between the offenses of robbery with a dangerous weapon and common law robbery. *S. v. Osborne*, 420.

**RULES OF CIVIL PROCEDURE****§ 4. Process**

Where service of summons is made by publication, plaintiff must file an affidavit specifically alleging that defendant's dwelling house is unknown and cannot with due diligence be ascertained. *Edwards v. Edwards*, 166.

**§ 7. Pleadings Allowed; Form of Motions**

A motion must state the rule number or numbers under which the movant is proceeding. *Mull v. Mull*, 154; *Lehrer v. Mfg. Co.*, 412.

**§ 12. Motion for Judgment on the Pleadings**

Defendant's motion for judgment on the pleadings is to be passed upon by the appellate court in light of the amendment to the complaint allowed by the trial court. *Mills v. Koscot Interplanetary*, 681.

**§ 17. Capacity of Party Defendant**

There is nothing in the record that required the trial court in an action for alimony without divorce to determine the competency of defendant, and trial judge's remark after trial that defendant needed a guardian was merely an expression of impatience. *Williams v. Williams*, 468.

**§ 19. Necessary Joinder of Parties**

Summary judgment is not a proper remedy for failure to join a necessary party. *Dildy v. Insurance Co.*, 66.

There was a fatal defect of parties in an action to have a parol trust impressed on property allegedly conveyed with instructions to divide such property among testator's children who had not already been conveyed a portion of her lands. *Wall v. Sneed*, 719.

**§ 38. Jury Trial of Right**

Trial court erred in determining that defendant had waived the right to a jury trial under Rule 38 by failing to file a written request therefor where the pleadings were closed prior to the effective date of the Rules of Civil Procedure. *Fishel and Taylor v. Church*, 238.

**§ 41. Dismissal of Actions**

Where trial court dismissed without prejudice plaintiff's original action on a fire policy for failure to obtain proper service of process on defendant insurer, plaintiff's new action instituted within the 30 days allowed by the court's order but more than a year after the loss was not

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RULES OF CIVIL PROCEDURE—Continued

barred by the one-year limitation provided in the policy. *Gower v. Insurance Co.*, 368.

Where a case is tried without a jury, the proper motion is for involuntary dismissal, not for directed verdict. *Mills v. Koscot Interplanetary*, 681.

**§ 50. Motion for a Directed Verdict**

The party having the burden of proof on all the issues was not entitled to a directed verdict. *Mull v. Mull*, 154.

Consideration of evidence on motion for directed verdict. *Supply Co. v. Murphy*, 351.

Directed verdict on the ground that plaintiff's evidence reveals contributory negligence as a matter of law is proper. *Riddick v. Whitaker*, 416.

In passing on defendant's motion for a directed verdict, evidence presented by defendant may be considered to the extent that it clarifies the plaintiff's case. *Jenkins v. Starrett Corp.*, 437.

All relevant evidence admitted by the trial court, whether competent or not, must be considered in ruling on plaintiff's motion for directed verdict. *Ibid.*

**§ 56. Summary Judgment**

Summary judgment is available to a claimant as well as to a defendant. *Sales Co. v. Plywood Distributors*, 429.

**§ 68.1. Confession of Judgment**

Clerk of superior court had jurisdiction to enter an order requiring that a father residing in this State shall provide for the support of his children who were living in Bermuda and who had never been residents of the State. *Whitehead v. Whitehead*, 393.

## SALES

**§ 10. Recovery of Goods or Purchase Price**

Plaintiff's bookkeeper could testify as to the existence and amount of the account sued on. *Supply Co. v. Murphy*, 351.

**§ 17. Sufficiency of Evidence in Action for Breach of Warranty**

Evidence was sufficient to support trial court's finding that the manufacturer of a chemical expressly and impliedly warranted that it was fit and proper to be used as a pre-emergent herbicide for control of grass and weeds in a squash crop. *Wilson v. Chemical Co.*, 610.

In an action against a manufacturer for breach of warranty of fitness of a pre-emergent herbicide for use on a squash crop, the failure of the herbicide retailer to give plaintiff the warning furnished by the manufacturer in its herbicide manual against use of the product under certain conditions did not constitute intervening negligence by the retailer. *Ibid.*

**§ 22. Action for Personal Injury Based Upon Negligence**

Plaintiff's evidence was insufficient for the jury in an action against the former owner of an outdoor ice merchandiser to recover for injuries resulting from an electrical shock received by plaintiff when he attempted to remove ice from the merchandiser. *Jenkins v. Starrett Corp.*, 437.

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## SEARCHES AND SEIZURES

### § 1. Search Without Warrant

Failure of an officer to actually arrest the defendant for a traffic violation committed in the officer's presence did not render inadmissible the marijuana which the officer saw in plain view in the hands of a passenger in the defendant's vehicle. *S. v. Fry*, 39.

There was no search when a police officer investigating a traffic accident opened the right side door of a van and saw in plain view a person holding a bag of marijuana in his hand; consequently it was lawful for the officer to seize the marijuana. *Ibid*.

Defendant had no standing to object to the search of an apartment rented by a female friend of defendant, notwithstanding defendant stayed overnight in the apartment three or four nights a week and had been given permission to use the apartment whenever he pleased. *S. v. Nickerson*, 125.

An officer who entered defendant's home to serve a valid arrest warrant could lawfully seize a quantity of marijuana which was in plain view. *S. v. Harvey*, 433.

### § 3. Requisites and Validity of Search Warrant

Search warrant and its affidavit substantially complied with constitutional and statutory requirements. *S. v. Blaylock*, 134; *S. v. Spencer*, 112; *S. v. Hood*, 170; *S. v. Williams*, 423.

Trial court properly ruled that heroin was seized pursuant to a lawfully obtained search warrant. *S. v. Walters*, 497.

## TAXATION

### § 27. Inheritance and Gift Taxes

Value of property given to donor's unemancipated minor child under the N. C. Uniform Gifts to Minors Act is included in the gross estate of the donor for State inheritance tax purposes where the donor appoints himself as custodian and dies before the minor donee attains his majority. *Korschun v. Clayton*, 273.

## TELEPHONE AND TELEGRAPH COMPANIES

### § 1. Control and Regulation

Utilities Commission erred in finding facts and approving an application by Southern Bell to extend its telephone service area to include an area served by a municipal telephone company after hearing only a portion of the evidence which the municipal telephone company desired to offer. *Utilities Comm. v. Pineville*, 663.

## TORTS

### § 7. Release from Liability and Covenant Not to Sue

Statute which abolished the distinction between a release and a covenant not to sue does not apply to litigation pending on 1 January 1968. *Ottinger v. Chronister*, 91.

Plaintiff's covenant not to sue one tortfeasor and consent judgment in which plaintiff took a voluntary nonsuit with prejudice as to that tortfeasor amounted to a release and barred plaintiff's right to maintain the action against the other tortfeasor. *Ibid*.

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TRIAL

## § 13. Allowing Jury to Visit Scene

The fact that a juror made an unauthorized visit to the scene of the crime did not entitle defendant to a new trial, and the trial judge acted within his discretion in thereafter ordering a view of the scene by the entire jury. *S. v. Smith*, 583.

Trial court did not err in failing to instruct the jury that evidence obtained by viewing scene of defendant's arrest should be considered only as illustrative evidence. *Ibid.*

## UNIFORM COMMERCIAL CODE

## § 15. Warranty of Fitness

Evidence was sufficient to support trial court's finding that the manufacturer of a chemical expressly and impliedly warranted that it was fit and proper to be used as a pre-emergent herbicide for control of grass and weeds in a squash crop. *Wilson v. Chemical Co.*, 610.

## UTILITIES COMMISSION

## § 1. Nature and Functions of Commission

When the Utilities Commission conducts a hearing, it acts in a judicial capacity and must render its decisions upon questions of law and fact in the same manner as a court of record. *Utilities Comm. v. Pineville*, 663.

## § 3. Jurisdiction and Authority of Commission Over Carriers

Evidence was sufficient to support Utilities Commission's amendment of a rule applicable to carriers of liquid petroleum in bulk in tank trucks by redefining "petroleum products." *Utilities Comm. v. Petroleum Carriers*, 554.

Statutes declaring it to be State policy to cooperate with national transportation policy do not require the Utilities Commission to adopt rules of the ICC. *Ibid.*

In a hearing upon a proposed amendment to the Commission's rule defining "petroleum products," notice of the hearing with an attached copy of the proposed amendment constituted sufficient notice to carriers who did not participate in the hearing of the entry of an order amending the rule in a more restrictive manner than the amendment proposed and attached to the notice. *Ibid.*

## § 6. Hearings and Orders

Utilities Commission did not err in admission of expert evidence without a specific finding that the witness was an expert. *Utilities Comm. v. Petroleum Carriers*, 554.

Utilities Commission's rule did not require that the testimony of an expert witness presented by appellees be filed with the Commission in advance. *Ibid.*

## VENDOR AND PURCHASER

## § 11. Abandonment and Cancellation of Contract

Evidence did not require trial court to instruct the jury that an option contract could be cancelled by conduct which naturally and justly led the other party to believe that the option provisions had been waived. *Hayes v. Griffin*, 606.

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VENUE

## § 2. Residence of Parties

Action against a national banking association may be brought in the county where the branch which transacted the business complained of is located. *Security Mills v. Trust Co.*, 332.

## § 7. Motions to Remove as Matter of Right

Where a wrongful death action was instituted in Onslow County against two residents of Onslow County and two residents of Jones County, the residents of Jones County were not entitled as a matter of right to have the case removed to their home county when plaintiff submitted to a voluntary dismissal with prejudice as to the residents of Onslow County. *Shaw v. Stiles*, 173.

## WILLS

## § 2. Contract to Devise

Oral contract to devise a portion of a farm in compensation for services rendered is within the statute of frauds and is unenforceable. *Hicks v. Hicks*, 347.

Revoked joint will devising property to plaintiffs is not competent evidence of a special contract to devise the property to plaintiffs. *Ibid.*

## § 4. Holographic Wills

A bona fide controversy existed as to whether a holographic document was found among the valuable papers and effects of testatrix. *College v. Thorne*, 27.

## WITNESSES

## § 1. Competency of Witness

Trial court did not err in determining that a 7-year-old child was a competent witness. *S. v. Williams*, 619.

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